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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-485

GEORGE I. NORMAN, JR., *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The petitioner prays that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the Tenth Circuit entered July 12, 1972. That judgment affirmed the petitioner's conviction in the United States District Court for the District of Colorado, entered January 27, 1971, on two counts of aiding and abetting the willful misapplication of bank moneys in violation of 18 U.S.C. §§ 656 and 2.

OPINION BELOW

The judgment of conviction of the district court is appended as Appendix A hereto (Pet. 1a). The opinion of the court of appeals, dated July 12, 1972, as amended, is unreported. A copy is appended as Appendix B hereto (Pet. 2a). The judgment of the court of appeals is appended as Appendix C hereto (Pet. 17a). The order of the court of appeals denying Norman's petition for rehearing is appended as Appendix D hereto (Pet. 18a).

JURISDICTION

The judgment of the court of appeals was entered July 12, 1972. A timely petition for rehearing with suggestion for rehearing *in banc* was filed July 26, 1972. An order denying the petition for rehearing was entered August 25, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Has the court of appeals sanctioned a dangerous and unwarranted expansion of an important federal criminal statute—18 U.S.C. § 656—prohibiting the "willful misapplication" of bank moneys?

2. Did the courts below improperly reject the petitioner's applications for a severance at trial?

STATUTES AND RULES INVOLVED

18 U.S.C. § 656 provides:

> *"Theft, embezzlement, or missapplication by bank officer or employee*
>
> "Whoever, being an officer, director, agent or employee of, or connected in any capacity with

any Federal Reserve bank, member bank, national bank or insured bank, or a receiver of a national bank, or any agent or employee of the receiver, or a Federal Reserve Agent, or an agent or employee of a Federal Reserve Agent or of the Board of Governors of the Federal Reserve System, embezzles, abstracts, purloins or willfully misapplies any of the moneys, funds or credits of such bank or any moneys, funds, assets or securities intrusted to the custody or care of such bank, or to the custody or care of any such agent, officer, director, employee or receiver, shall be fined not more than $5,000 or imprisoned not more than five years, or both; but if the amount embezzled, abstracted, purloined or misapplied does not exceed $100, he shall be fined not more than $1,000 or imprisoned not more than one year, or both.

"As used in this section, the term 'national bank' is synonymous with 'national banking association'; 'member bank' means and includes any national bank, state bank, or bank and trust company which has become a member of one of the Federal Reserve banks; and 'insured bank' includes any bank, banking association, trust company, savings bank, or other banking institution, the deposits of which are insured by the Federal Deposit Insurance Corporation."

18 U.S.C. § 2 provides:

"*Principals*

"(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

"(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal."

Rule 8 of the Federal Rules of Criminal Procedure provides:

> *"Joinder of Offenses and of Defendants*
>
> "(a) *Joinder of Offenses.* Two or more offenses may be charged in the same indictment or information in a separate count for each offense if the offenses charged, whether felonies or misdemeanors or both, are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan.
>
> "(b) *Joinder of Defendants.* Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count."

Rule 14 of the Federal Rules of Criminal Procedure provides:

> *"Relief From Prejudicial Joinder*
>
> "If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires. In ruling on a motion by a defendant for severance the court may order the attorney for the government to deliver to the court for inspection *in camera* any statements or confessions made by the defendants which the government intends to introduce in evidence at the trial."

STATEMENT

The court below has sanctioned an impermissibly broad reading of an important federal criminal statute. It has also upheld an improper and prejudicial joinder of alleged offenses and defendants in violation of the Federal Rules of Criminal Procedure. On both counts, this Court's review is required to correct potentially recurrent errors in the administration of federal criminal justice.

Norman, along with five other defendants, went to trial before a jury on a 13-count indictment in the United States District Court for the District of Colorado. The government charged a conspiracy and the substantive offense of willfully misapplying the funds of the Rocky Mountain Bank of Lakewood, Colorado, in violation of 18 U.S.C. § 656.[1] Norman was convicted on two counts of aiding and abetting the commission of the substantive offense, in violation of 18 U.S.C. § 2. He was sentenced to two concurrent two-year prison terms and two $2,000 fines. The Court of Appeals for the Tenth Circuit affirmed Norman's conviction over his contentions, among others, that the trial court erred in its instruction concerning the offense of willful misapplication and in its refusals to grant Norman's repeated motions for severance.

The trial, consuming 16 court days, ranged over a variety of commercial transactions spanning a year

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[1] Section 656 provides pertinently:

"Whoever, being an officer [or] director . . . of . . . any . . . insured bank . . . , willfully misapplies any of the moneys [or] funds . . . of such bank," is guilty of an offense. An "insured bank" is defined as any bank the deposits of which are insured by the Federal Deposit Insurance Corporation.

and a half. The overt acts relied upon by the government in support of its conspiracy charge were rearrayed as the substantive counts in the indictment. The jury was subjected to a welter of evidence, both testimonial and documentary, replete with a battery of limiting instructions on behalf of one or another of the defendants.[2] The trial was marked by the efforts of one of the co-defendants to exculpate himself by repeated allusions to Norman's previous criminal conviction—a conviction subsequently set aside by the Colorado Supreme Court.[3] By the end of the trial, the judge himself was convinced that a severance should have been granted. At one point he said:

> "It is very, very—I don't like it, where a conspiracy is charged and then twelve other counts in the same indictment. I may have made a mistake in this case by not severing it. I don't feel happy about allowing all this hearsay testimony in and all this stuff, but as I read the law at this point it can be done."

The thrust of the government's case was directed not against Norman, but against his co-defendants, who were officers and directors of the Rocky Mountain Bank. The evidence at trial, as viewed by the court of appeals most favorably to the government, permitted the jury to find that the co-defendants arranged for outside borrowers to apply for loans from the bank. The proceeds of those loans were then turned over to the co-defendants, who used the money for their own investment purposes (Pet. 3a).

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[2] The trial transcript consumed over 2,600 pages; more than 500 exhibits were received in evidence.

[3] See *People* v. *Norman*, — Colo. —, 496 P.2d 1029 (1972).

Norman's situation was altogether different. In the words of the court of appeals, Norman "was never an officer, director, employee or otherwise connected with the Rocky Mountain Bank" (Pet. 3a). Rather, the government's charge against Norman was that, as a borrower from the bank, he arranged for loans to two nominees and then directed the proceeds to the benefit of bank officials.

Norman did not contest his use of nominees to obtain the loans. One of the two loans—for $81,000—went to Lakewood Medical Center, Inc., a company controlled by Norman and having as its principal asset a medical office building in Denver. The stock of the company was pledged at the Bank as security for the loan. At all times the government conceded that the income from the building more than sufficed to meet the payments on the loan, and went to the Bank in regular monthly installments from the inception of the corporate indebtedness.

The second loan—also for $81,000—went to Cloyd Wangsgard, Norman's accountant, on the strength of Wangsgard's statement of a net worth treble the amount of his borrowing. The government's own proof showed that Wangsgard entered into the transaction as an accommodation for Norman, a long-time client.[4] That accommodation concededly was lawful under Colorado law, as was the Bank's reliance upon Wangsgard's statement of net worth as the basis for the loan.

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[4] Wangsgard knew he was personally obligated to the Bank on the loan. He obtained a written guaranty of repayment from Norman.

Norman did not contest that he applied the loan proceeds to his own benefit.[5] Nor did the government rest its charge of culpability against Norman on the ground that he had benefited from loans to his nominees. Rather, throughout the proceedings before the trial court, the government's theory was that Norman's co-defendants had committed criminal acts by obtaining the loan proceeds for *their* benefiit, with Norman's knowing assistance. Thus, the indictment charged that Donald and Delmar Cooper, officers and directors of the bank, misapplied bank funds by causing the two loans "to be made to their own benefit," and that in that unlawful enterprise, they had been aided and abetted by Norman (App. 83).[6] Such was the theory put forth by the government in its opening and closing statements to the jury. And such was the thrust of the government's evidentiary submission. Specifically, the government urged that once the loans were made, the funds were commingled in the Medical Center, Inc. checking account; that part went to a company controlled by the Coopers; and that the balance went to

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[5] The proceeds of the Wangsgard and the Medical Center, Inc. loans were deposited to the Medical Center account at the Bank, and then disbursed in two checks. One of the checks, for approximately $124,000, was used by Wangsgard to discharge a prior mortgage on the medical building and then to reimburse Norman's family for the sale of their realty interests, pursuant to tax- and estate-planning considerations drawn up by Wangsgard for the Normans' benefit. The other check, in an amount constituting all but a few hundred dollars of the balance on the loans, went to Greater Leasing Corporation, an unrelated company in which Norman had an interest together with his co-defendants Donald and Delmar Cooper, officers at the bank.

[6] "App." refers to the record on appeal before the court below; "Tr." refers to the transcript of proceedings before the trial court.

Norman, with a portion of the security coming under the control of the Coopers.[7]

But that was not the theory on which the government's case went to the jury. For the trial court instructed the jury over Norman's objection that

> "[m]isapplication under [§ 656] . . . may be committed in either of the following ways: First, by an officer or director of an insured bank causing a loan to be made for his own benefit and concealing *his* interest in the loan from the bank, or, secondly, *by an officer or director of the bank causing a loan to be made and knowingly concealing from the bank the identity of the true borrower*" (Tr. 2589) (emphasis supplied).

The latter part of the court's instruction took into account the government's argument that Norman had assisted the Coopers in *their* obtaining benefits from the Bank's loans to Wangsgard and Medical Center, Inc. But the court's instruction also encompassed the unchallenged transactions by which Wangsgard and Medical Center, Inc. had borrowed money at Norman's behest. The court required the jury to predicate liability on an officer or director of the bank's having caused a loan to be made without disclosing the identity of the true "borrower." But the court left the jury free to decide whether that "borrower" was the Coopers—as

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[7] No proof was admitted against Norman to show the ultimate collection of the Wangsgard loan. With respect to the Medical Center, Inc. loan, the evidence showed that the company had pledged all its outstanding stock to the bank as security. One month subsequent to the loan transaction, the government charged, title to the medical center was deeded to the Coopers, Medical Center, Inc., and Norman's wife. The sole evidence before the court on this point was Norman's testimony that the deed had been given as further security for the bank loan. The undisputed fact, also before the trial court, was that under Colorado law the bank could not own real property in its own name.

charged by the government—or Norman himself, as conceded by all parties.

The court's instruction thus became hopelessly ambiguous. It permitted the jury to find Norman guilty of aiding and abetting the Coopers because *they* allegedly had acquired a pecuniary benefit for one of their companies and an interest in Medical Center, Inc. But it also permitted the jury to find Norman guilty of aiding and abetting because the Coopers had authorized loans to *Norman*—through Wangsgard and Medical Center, Inc. as Norman's nominees. The instruction, in sum, permitted the jury to find Norman guilty solely because he had used nominees to obtain loans from the bank—without regard to whether he had knowingly participated in the alleged benefits flowing to the Coopers.

The ambiguity in the court's language was fatal to Norman's cause. For it was undisputed that he had called upon Wangsgard to borrow from the bank as an accommodation to him; also that he had caused Medical Center, Inc. to borrow from the bank as part of the loan transaction involving the Medical Center building. On the other hand, the question of Norman's participation in the Coopers' alleged benefiting from the transaction was hotly contested. The jury had before it the fact that the names of the Coopers appeared as grantees in a deed transferring title to the medical building. From that fact the government asked the jury to infer that Norman had knowingly aided and abetted the misappropriation of property pledged to the bank as security for its loan. Norman, on the other hand, denied any knowledge of wrongdoing, and pointed in any event to the fact that as a matter of Colorado law the bank was disabled from taking title to the property.

On appeal, Norman and his co-defendants reiterated their objections to the trial court's charge. The court of

appeals dismissed the objections virtually without comment.[8] It then upheld Norman's conviction on precisely the transaction that had previously gone unchallenged.

The court of appeals recognized that only a limited class of persons—such as officers and directors of a bank—can violate § 656 (Pet. 6a). It recognized as well that "[e]ssential to the crime of aiding and abetting a bank official in violating Section 656 is the guilt of the bank official" (Pet. 8a). But it accepted the trial court's definition of the statutory offense. Accordingly, it interpreted the government's contention against Norman to be that "like the Coopers . . . [he] secured people who would apply for loans from the Rocky Mountain Bank, and [who] after approval and payment of the loan proceeds would deliver the money to Norman for use *by him in his own business ventures*" (Pet. 3a) (emphasis supplied).

Proof of the court of appeals' misunderstanding of the case is found in its concluding observations on Norman's status as aider and abettor.

> "[I]t must be shown the misapplication was for the benefit of the bank officer *or the aider and abettor*. The evidence clearly establishes that the loans made to the borrowers secured by Norman were made *in part* for the benefit of the Coopers. The fact that Norman was not the named borrower in each of the loans does not serve to insulate him. *The evidence discloses the active solicitation and securing of borrowers by Norman and renders the ultimate borrowers to be in reality Norman's*

[8] "Appellants maintain," it said, "that certain of the instructions were improper and further that the trial court erred in refusing to give certain instructions tendered by the defendants. The instructions given, when considered as a whole adequately explained the applicable law" (Pet. 15a) (footnote omitted).

alter-ego acting at his direction" (Pet. 8a) (emphasis supplied).

Thus, the court below affirmed Norman's conviction on the ground that in accordance with the trial court's instructions, the jury could have convicted *either* because Norman assisted the Coopers in securing to *them* the benefits of the loans or their security, or because Norman *himself* had obtained the benefits of loans from the bank, predicated upon the financial statement of one nominee borrower and the realty interest of another.

The court of appeals similarly brushed aside Norman's objection that the trial court had erred in denying his motions for severance, raised both before and during trial. In response to Norman's detailed demonstration of the unfairness inherent in the government's combination of offenses and defendants, and the prejudice flowing from developments at trial, the appellate court merely stated its perfunctory conclusion that it found neither violation of the federal rules nor abuse of the trial court's discretion. The court of appeals took no note of—and did not deal with—Norman's argument that a severance should have been granted after the government's conspiracy charge against him was dismissed, and surely after a fellow defendant had sought to clear himself by alluding inferentially to Norman's previous criminal difficulties.

REASONS FOR GRANTING THE WRIT

I. THE COURT OF APPEALS HAS SANCTIONED A DANGEROUS AND UNWARRANTED EXPANSION OF A MAJOR FEDERAL CRIMINAL STATUTE

The court of appeals' judgment opens up an intolerable new sweep in 18 U.S.C. § 656 at the same time that it perpetrates an injustice to the petitioner now before

the court. In the context of a case where bank officers and directors have allegedly engaged in "misapplications" of bank funds in violation of § 656, the court has sanctioned the conviction of an outsider whose sole connection to the bank is as a borrower using nominees to take down his loans—even where the nominees themselves are fully able to pay back the loans, and where security for the loans indisputably suffices to protect the lending bank. That expansion calls for the corrective review of this Court.

The term "misapplication," as used in § 656, has long been a part of the federal criminal statute now codified in 18 U.S.C. § 656. But the federal courts still struggle to impart meaning to the term.[9] Although they insist that the statutory concept is not, of itself, "a vague word of such uncertain application as to require dismissal of the indictment," *United States* v. *Fortunato*, 402 F.2d 79, 81 (2d Cir. 1968), *cert denied*, 394 U.S. 933 (1969),[10] the court below has recently conceded that the adequacy of the term to advise a defendant of his alleged offense "poses a . . . difficult question." *United States* v. *Archambault*, 441 F.2d 281, 283 (10th Cir. 1971).

By and large, the lower courts have followed this Court's holding in *United States* v. *Britton*, 107 U.S. 655 (1882), that a conversion of bank moneys in the common-law sense is an essential element of the

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[9] See, *e.g.*, *Hargreaves* v. *United States*, 75 F.2d 68 (9th Cir.), *cert. denied*, 295 U.S. 759 (1935); *Robinson* v. *United States*, 30 F.2d 25 (6th Cir. 1929).

[10] See also *United States* v. *Hickey*, 360 F.2d 127, 144-45 (7th Cir. 1966).

offense [11]—although the court below has recently expressed doubt on that score. *United States* v. *Archambault, supra.*

One reading of the statute, promulgated by the Court of Appeals for the Second Circuit in 1968 and ostensibly adopted below, is that "misapplication occurs when an officer of a bank knowingly lends money to a fictitious borrower or causes the loan to be made to his own benefit, concealing his interest from the bank." *Fortunato, supra,* at 81. The *Fortunato* definition may have worked well enough given the facts of that case. There a bank officer made out loan applications by fictitious persons, or increased the applications of real persons without their knowledge and appropriated the excess to himself.

But here the *Fortunato* test has ensnared a defendant whose sole connection to the bank was as a customer. Here, the trial court has permitted the jury to convict Norman solely on his use of nominees to enter into loan transactions with the bank. And the court of appeals has upheld the conviction precisely on that ground. The ruling below jeopardizes all persons who deal with federally insured banks through individual nominees or controlled corporations.

Norman's conviction is not saved by the statutory requirement that an unlawful misapplication must be "willful." For examination of the record reveals an absence of any evidence upon which the jury could have found such willfulness. The government failed to adduce any proof that Norman participated in a

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[11] *E.g., United States* v. *Quinn,* 365 F.2d 256 (7th Cir. 1966); *United States* v. *Wiggenhorn,* 312 F.2d 289 (9th Cir. 1963); *Lippi* v. *Thomas,* 298 F.Supp. 242, 248 (M.D. Pa. 1969).

scheme to injure or defraud the Rocky Mountain Bank. Instead, the prosecution fell back on the involved nature of Norman's commercial affairs, and the fact—conceded by all—that Norman had had other, unrelated business dealings with his co-defendants. In effect, the jury was invited to fashion the necessary finding of subjective intent from the supposed complexity of Norman's business affairs—however legitimate those affairs might be. As the trial court charged in a post-trial proceeding, "You don't think Mr. Norman's transaction or his dealings here was what you call a typical or a day-to-day deal at a bank?" The court conceded that the intricate nature of the loan transaction "may have added to [the jury's] difficulty in fully understanding it, because it was difficult for me and I am sure some of the others to understand that [sic] read and reread some of it." (Transcript of post-trial and sentencing proceeding, p. 50.) That difficulty enabled the court to uphold the jury's verdict: "[W]e don't want anyone to be convicted by . . . guilt by association, but if you associate yourself with people who are engaging in illegal activities and you ask for a piece of the action and get it, then you are responsible for the results that may obtain" (*id.*, p. 86).

The court of appeals was even more pointed in its willingness to sustain Norman's conviction on the ground that he engaged in complex business dealings. In summarizing the evidence against Norman, the court sought to buttress its conclusion of guilt by noting that the loan proceeds ultimately went to either Norman or his wife—"after being shunted through a complicated series of transactions" (Pet. 8a). Those transactions, however, had been undertaken solely to retire outstanding obligations on the building, and to mini-

mize the tax burdens on Norman and his family incident to the sale of their interest in the medical center building. The fact that the transactions were "complicated" does not mean that Norman was thereby guilty of aiding and abetting in the willful misapplication of bank funds.

II. THE COURTS BELOW IMPROPERLY REJECTED NORMAN'S REQUESTS FOR SEVERANCE

1. *Norman was entitled to a severance as a matter of right.* From the outset of the criminal proceeding, throughout his three-week trial, and on appeal, Norman urged that subjecting him to trial on a variety of counts as to which he had no knowledge, alongside a number of defendants with whom he had had no pertinent contact, deprived him of his right to have his guilt or innocence fairly—and individually—decided.

That right is safeguarded by Rule 8 of the Federal Rules of Criminal Procedure.[12] Under the Rule, Norman was entitled to a severance solely on the basis of the indictment on which the defendants went to trial. The indictment's twelve substantive counts were founded on separate loan transactions at the Rocky Mountain Bank over a year-and-a-half period. The

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[12] As to the joinder of offenses, Rule 8 provides pertinently: "Two or more offenses may be charged in the same indictment . . . if the offenses charged . . . are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan." As the joinder of defendants, the Rule provides: "Two or more defendants may be charged in the same indictment . . . if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses."

overt acts making up the conspiracy count consisted of the loan transactions underlying the substantive charges.

By the close of the government's case, Norman had become a distinctly peripheral figure. Although he was named in the conspiracy count, the trial court dismissed that charge at the close of the government's case. Of the seven substantive counts in which he was named as an aider and abettor, two were severed and a third dismissed; only four reached the jury. On those the jury acquitted as to two. Meanwhile, several thousand pages of testimony and some five hundred documentary exhibits swirled about Norman—much of it involving the five other defendants and the five counts in which Norman was not even named.

The government opposed Norman's pretrial motion for severance. It pointed to the initial conspiracy count, containing as its overt acts the very transactions underlying the substantive charges, as the connecting thread. But for Norman that thread had snapped by the close of the government's case. The government simply failed to adduce proof of his participation in an over-arching conspiracy embracing the various acts charged, or, for that matter, in any conspiracy at all.

Nonetheless, the court of appeals cursorily rejected Norman's contention that joinder had been improper as a matter of law under Rule 8. As to the joinder of offenses, the court merely paraphrased the language of the Rule: "It is a general rule that 'a conspiracy count may properly be joined with substantive counts where it is alleged *and shown* that the offenses are of the same or similar character and are based upon two or more acts or transactions connected together or constituting

parts of a common scheme' " (Pet. 12a) (emphasis supplied). The court of appeals thereby overlooked that its "general rule" had no application to Norman, as to whom the government had failed to make a showing sufficient even to carry its case to the jury.

On the joinder of defendants, the court of appeals said, "There was sufficient evidence that the appellants were joint participants in the same act or transaction or series of acts or transactions to warrant their joint indictment" (Pet. 13a). That conclusion was flatly wrong as to Norman—for on its face, the indictment did not purport to associate Norman with two of his five co-defendants on *any* substantive count.

This Court last addressed itself to the administration of Rule 8 in *Schaffer* v. *United States,* 362 U.S. 511 (1960). There, as here, a conspiracy count essential to the denial of a pretrial Rule 8 motion for severance failed of proof and was dismissed before the submission of various substantive counts to the jury. The Court held that severance need not automatically have been ordered at that point. Over the dissents of four Justices, including Justices Douglas and Brennan, the Court ruled that no "hard-and-fast formula" requiring severance should be adopted in such a situation.

The present case illustrates the unsatisfactory nature of the *Schaffer* outcome. In avoiding a "hard-and-fast" rule, the court below avoided any rule whatever. It merely tracked the language of Rule 8, without attempting to apply any reasoning to the facts of the appeal before it. Norman's petition thus presents the question whether the Court should adopt the standard proposed in *Schaffer* by Mr. Justice Douglas in dissent:

"I believe that once the conspiracy count was dismissed, the court had before it the same problem as would be presented if the prosecution had sought to try before a single jury separate indictments against defendants who had been charged with like crimes but which were wholly unrelated to each other." 362 U.S., at 520.

2. *The prejudice to Norman arising from developments at trial should have compelled a severance.* Even if Norman was not entitled as of right to a severance under Rule 8 upon the collapse of the government's conspiracy charge against him, he surely became entitled to a severance as the cumulative result of various prejudicial developments at the trial.

The problem remaining after the dismissal of the conspiracy count was, as this Court has said in *Schaffer,* "whether . . . a severance should have been ordered under Rule 14 of the Federal Rules of Criminal Procedure." 362 U.S., at 514 (footnote omitted).[13] The court in *Schaffer* emphasized that where the government's unifying conspiracy count has failed for want of proof, "the trial judge has a continuing duty at all stages of the trial to grant a severance if prejudice does appear. And where, as here, the charge which originally justified joinder turns out to lack the support of sufficient evidence, a trial judge should be particularly sensitive to the possibility of such prejudice." 362 U.S., at 516.

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[13] Rule 14 provides pertinently: "If it appears that a defendant . . . is prejudiced by a joinder of offenses or of defendants in an indictment . . . or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires."

The courts below did not heed this Court's admonition. To the contrary, the trial and appellate courts permitted a massive contamination of the process by which the jury determined Norman's guilt or innocence. Indeed, the court of appeals brushed aside Norman's contentions with the three-sentence observation that under Rule 14 the burden of showing prejudice is on the movant, that the granting or denial of the motion is within the discretion of the trial court, and that here it found no abuse of that discretion (Pet. 13a).

In its cursory treatment of Norman's claim, the court below ignored a series of elements, each of which constituted ample ground for severance and which, together, compelled it.

First. Norman was prejudiced by the sheer volume of evidence, both documentary and testimonial, that was irrelevant to his case. In a separate trial, none of the evidence pertaining to the counts in which Norman was uninvolved could have been admitted or considered by the jury.[14] To be sure, the court admonished the jury throughout the trial that it could consider certain evidence only in relation to certain defendants and as to certain counts. Bnt the complexity of the case, the sheer volume of the evidence, and the confusion in both the court (*e.g.*, Tr. 538-539, 964-966) and the pros-

[14] The evidence relating to the bank officers' consumption of alcohol on the premises of the bank would not have been considered. The testimony concerning the loans to various family members of one or more of the defendant officers would have been excluded. The evidence pertaining to the Denver Revival Tabernacle, and the result that transaction had on Cooper intrafamily loans, would not have been heard by the jury. The evidence surrounding the closing of the Rocky Mountain Bank, the posting of guards, and the seizure of bank records would have gone unheard.

ecutor (*e.g.*, Tr. 659, 1077), necessarily nullified any attempt at individual consideration of Norman's cause.

Second. Severance became even more critical when the court acquitted Norman on the conspiracy charge. That dragnet count had led the court to deny Norman a severance at the outset of the case (App. 174, 196). With the elimination of the conspiracy charge as to Norman, the evidence previously let in under the conspiracy theory against him became inadmissible. But no instruction to the jury could have eliminated the fact that the jury had heard what it should not have; no instruction could erase the evidence from the jury's mind. Towards the end of the trial, the court itself remarked:

> "I am not too happy about the conspiracy charge and I guess we are never too old to learn, but I think I have learned something in this trial about trying a conspiracy case. Where we have some substantive counts.
>
> "But I am too far in this one to back out now. So I'll have to take care of it some other way if I still think it's been improperly handled" (Tr. 2335.)

Under the circumstances, the court had a continuing duty to grant a severance to Norman. The court was concerned about the prejudice resulting from the joint trial of the conspiracy and substantive counts, and the subsequent dismissal of the conspiracy count as to Norman. But the government persuaded the court that the interests in conserving expenses and disposing of the case outweighed the duty to afford Norman a fair and unprejudicial trial. In acceding to the government's position, the trial court committed serious error.

Third. A final factor, by itself warranting a severance, resulted from the announced intention of Norman's co-defendant, Donald S. Cooper, to testify that he had taken certain actions in connection with challenged loan transactions because of Norman's conviction (subsequently reversed) in a Colorado state court.[15] Because Norman's state conviction was on appeal, the trial court ruled that no use could be made of the conviction to impeach Norman should he take the stand in his own behalf. The court accordingly warned Cooper that if he voluntarily testified to Norman's conviction, he would be cited for contempt, but that Cooper could say an "emergency" situation had arisen in justification of his conduct. Norman's motion for severance was denied. Although the court later thought of granting the severance, it adhered to its ruling when the government objected that a severance would be costly to the taxpayers.

Cooper never explicitly stated that Norman had been convicted of a crime. Instead—and far worse—throughout his testimony, Cooper referred dramatically and mysteriously to a "great" and "critical" situation, an "emergency" affecting Norman.[16] Cooper's

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[15] Cooper contended that this conviction jeopardized the position of the Rocky Mountain Bank because the FCC might revoke a radio station license vital to the continued operation of Greater Leasing Corporation, a borrower from the Bank.

[16] Thus, in connection with one of the loan transactions, Cooper testified that there were "extenuating circumstances" involving Norman that were "very critical" in Jefferson County. These, he stated, "drew great publicity." In approving the loan, he said his judgment was based on an emergency that then existed—a statement immediately reiterated. And he opened another aspect of his testimony with the statement that "I have to be careful in my comments—that once again this involves George I. Norman, Jr. and once again it became necessary for me to make a judgment

repeated references to the so-called "emergency," coupled with voice inflection, gesticulations, and dramatic effects, obviously raised puzzling questions in the minds of the jury.[17] The speculation necessarily created by Cooper's innuendo was destructive to Norman's case. When Norman took the stand in his own behalf, he was faced with the agonizing choice either to explain Cooper's damaging suggestions by testifying to a recent conviction in another jurisdiction, or to leave the jury free to conjure up the very worst its imagination would allow by standing on his right to be silent on the non-final conviction. No matter which route Norman took, the outcome was the same—a body blow to his chances that the jury would decide the government's case against him fairly and on its individual merits.

A severance would have alleviated the problem presented by Cooper's testimony. Cooper would have been

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for the best interests of the bank." When reference was made to Greater Leasing's application for a radio license, Cooper twice stated that he was prompted to make the application because of a serious problem with Norman, by reason of which the Bank stood to lose a considerable amount of money. Upon cross-examination, Cooper stated that his involvement in the Wangsgard and Lakewood Medical Center loans "resulted in an emergency in that county involving Mr. Norman."

[17] The situation was aggravated by the closing arguments of Cooper's counsel, who repeatedly referred to the "situation" in Jefferson County. In regard to Lakewood Medical Center, the subject was raised on two separate occasions. Indeed, the jury might well have construed the innuendo—created by the comment that the "situation" in Jefferson County prompted Cooper to send an auditor to the Lakewood Medical Building to capture the cash flow—to mean that Norman had engaged in some sort of culpable conduct in regard to that building. That inference was totally at odds with the facts. The cloak of suspicion already cast upon Norman by Cooper's testimony was thus further extended.

free to testify as he chose. Norman would not have been burdened with the suspicions cast upon him by his co-defendant. The "unanswered questions" would never have confounded the jury called upon to determine Norman's guilt or innocence. While the court might not have anticipated the extent to which Cooper would carry his testimony, it obviously became aware of the prejudicial impact of that testimony after it occurred. Again, the court should have exercised its "continuing duty" to sever Norman's case or to declare a mistrial as to him.

The trial court permitted the prejudice to Norman's case as a matter of "judicial economy." That approach, offhandedly sanctioned by the court of appeals, ignores the mandate of Rule 14 and this Court's directive in *Schaffer*. The Rule, as explicated in *Schaffer*, focuses on actual prejudice arising during the course of trial. The proper test has been well summarized by Judge Weinfeld:

> "[A] single joint trial, however desirable, may not be had at the expense of a defendant's right to a fundamentally fair trial. Economy of judicial manpower and the prompt trial of those accused of a crime must be weighed against possible unfairness to a defendant .... The ultimate question is whether, under all the circumstances of the particular case, as a practical matter, it is within the capacity of the jurors to follow the court's admonitory instructions and accordingly to collate and appraise the independent evidence against each defendant solely upon that defendant's acts, statements and conduct." *United States* v. *Kahaner*, 203 F.Supp. 78, 81 (S.D.N.Y. 1962) (footnotes omitted).

In applying this test, other courts of appeals have not permitted the pursuit of tactical advantages by the

government to override the right of a criminal defendant to a determination of his guilt or innocence solely on an individual basis. For example, in *United States* v. *Branker,* 395 F.2d 881 (2d Cir. 1968), a number of defendants had been charged with conspiracy to commit various crimes relating to income-tax returns and with the substantive offenses. At the close of the government's case, the conspiracy count was dismissed as to the appellant, who had been named in only some of the counts. The court of appeals found prejudicial error in the individual taxpayers' joint trial with the central figures. The court said:

> "This kind of prejudice is particularly injurious to defendants who are charged in only a few of the many counts, who are involved in only a small proportion of the evidence, and who are linked with only one or two of their co-defendants. . . . As trial days go by, 'the mounting of proof of the guilt of one is likely to affect another.' . . . ."
>
> . . .
>
> "Apart from the prejudice inherent in any mass trial, a defendant in a trial in which the conspiracy count has been dismissed is likely to be prejudiced in defending the charges in the substantive counts by evidence, particularly hearsay testimony, which was admissible on the conspiracy counts but which could not have been used against him in a separate trial on the substantive counts. . . .
>
> . . .
>
> "Courts have recognized the grave danger of this kind of prejudice and have required 'impregnable' safeguards to protect against it." 395 F.2d, at 888.

The court of appeals noted that the trial judge had instructed the jury on the evidence it might consider against each defendant, without itemizing the evidence

that had been stricken. This, the appellate court concluded, left to the jury "the task of mastering these abstract principles and applying them to the vast amount of evidence introduced at the trial"; "the risk of prejudice to the taxpayer defendants by reason of the joinder [became] . . . so great that 'no amount of cautionary instructions could have undone the harm.'" *Id.*, at 888-89.

The authors of the American Bar Association's Standards Relating to Joinder and Severance (Approved Draft 1968) have said that whether joinder is proper

> "involves a weighing of the possible prejudice to the defendant from joinder against the public interest in avoiding duplicitous, time-consuming trials in which the same factual and legal issues must be litigated.... On this score, joinder of offenses not part of a single scheme or plan is difficult to justify" (page 29).

As for the argument that a trial court's limiting instructions suffice to avoid prejudice, the same authors have noted that

> "Although 'our theory of trial relies upon the ability of a jury to follow instructions,' *Opper* v. *United States,* 348 U.S. 84, 95 (1954), what empirical evidence is available tends to show that in some situations jurors do not do so" (page 41).

In recent cases such as *Bruton* v. *United States,* 391 U.S. 123, 129 (1968), and *Jackson* v. *Denno,* 378 U.S. 368, 388 (1964), this Court has recognized the truth of Mr. Justice Jackson's famous remark:

> "The naive assumption that prejudicial effects can be overcome by instructions to the jury . . . all prac-

ticing lawyers know to be unmitigated fiction." *Krulewich* v. *United States,* 336 U.S. 440, 453 (1949).

Where, as here, the prejudicial impact of unrelated testimony is clear, and it is unlikely that the jurors would have segregated three weeks of testimony and argument to discard that which they could not properly apply to Norman, denial of repeated motions to sever cannot be justified.

CONCLUSION

For the foregoing reasons, the petitioner, George I. Norman, Jr., respectfully prays that his petition for a writ of certiorari be granted.

Respectfully submitted,

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APPENDIX

APPENDIX

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

[Caption and Footnotes Omitted]

On this 22nd day of January, 1971 came the attorney for the government and the defendant appeared in person and by counsel,

IT IS ADJUDGED that the defendant upon his plea of not guilty and a verdict of guilty to Counts VIII and IX, has been convicted of the offense of misapplication of funds of FDIC insured bank, in violation of Title 18, United States Code, Section 656, as charged in the Indictment returned 6-5-70, and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of two (2) years upon each of Counts VIII and IX; said sentences to run concurrently, the defendant to become eligible for parole at such time as the Board of Parole may determine under the provisions of Title 18, United States Code, Section 4208(a)(2).

IT IS FURTHER ADJUDGED that the defendant shall be fined in the amount of $2,000.00 upon each of Counts VIII and IX, said fines to stand upon commitment.

IT IS FURTHER ADJUDGED by the Court that the defendant be granted a seven (7) day stay of execution, at which time he shall surrender to the Office of the United States Marshal.

IT IS FURTHER ADJUDGED that Counts I, VI, VII, XI, XII, and XIII of the Indictment herein be and the same are hereby dismissed.

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ ALFRED A. ARRAJ
Alfred A. Arraj
United States District Judge.

The Court recommends commitment to

APPENDIX B

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

MAY, 1972, TERM

[Caption Omitted]*

Before BRIETENSTEIN, HILL and MCWILLIAMS, United States Circuit Judges.

HILL, Circuit Judge.

These are direct appeals from convictions of Donald, Delmar and Paul Cooper and Francis Salazar, as principals, and of George Norman, as aider and abettor for alleged misapplication of moneys of a statutorily defined insured bank in violation of 18 U.S.C. § 656 and § 2.

Twelve counts of the thirteen count indictment returned by the grand jury charged various of the appellants of separate transactions, each constituting a misapplication or embezzlement of funds of the insured bank. The first

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* The opinion is as amended pursuant to a letter of the Clerk of the Court of Appeals dated August 11, 1972.

count of that indictment charged all the appellants with conspiracy to commit an offense against the United States in violation of 18 U.S.C. § 371 and listed twelve transactions constituting eleven of the substantive counts as overt acts of the conspiracy. Five of the substantive counts were otherwise disposed of by dismissal or severance and were not considered by the jury. Of the remaining counts, guilty verdicts were returned under count one, the conspiracy charge, against Delmar and Donald Cooper and Salazar; against all three of the Coopers and Salazar on count five; and against Delmar and Donald Cooper and George Norman on counts eight and nine.

The Coopers and Salazar were officers and directors of the Rocky Mountain Bank at Lakewood Colorado, the "insured bank" through which the alleged misapplication was committed. The scheme allegedly used involved the securing of borrowers by the Coopers and Salazar who would apply for loans from the Rocky Mountain Bank. The loan application would be presented to and approved by the Loan and Discount Committee of the bank, the membership of which was partially comprised of various of the Coopers and Salazar. The loan proceeds were then paid the borrower by Donald or Delmar Cooper acting as an officer of the bank. The borrower would endorse the loan proceeds check and return it, usually to either Donald or Delmar Cooper. This money was then used for the private investment purposes of the Coopers and Salazar.

The charge against Norman is substantially similar with the exception that he was never an officer, director, employee or otherwise connected with the Rocky Mountain Bank. It is the government's contention that Norman, like the Coopers and Salazar, secured people who would apply for loans from the Rocky Mountain Bank, and after approval and payment of the loan proceeds would deliver the money to Norman for use by him in his own business ventures. The link connecting Norman as an aider and

abettor and co-conspirator is supplied, according to the contention of the government, by the appearance of Donald and Delmar Cooper as officers of one of the business interests of Norman. The government also contends part of the proceeds of the loans made in connection with Norman were used by Donald and Delmar Cooper to acquire an interest in one of the Norman enterprises.

These schemes, according to the government, faltered when certain of the loans were reviewed by federal banking officials. It was apparently thought by appellants that scrutiny could be avoided by removing these loans from their status in the bank as outstanding loans. To accomplish this, the Denver Revival Tabernacle, a Cooper-owned establishment, was transferred to the Rocky Mountain Bank in exchange for certain of the suspect loans. The government contends the value assigned the Tabernacle property in the exchange transaction was grossly over valued, thereby causing a great financial loss on the loans by the exchange transaction.

Each of the appellants questions the sufficiency of evidence to sustain his conviction. A synopsis of the evidence adduced on each count on which convictions were ultimately returned is dispositive. Count five of the indictment charged that the three Coopers and Salazar, as officers and/or directors of the bank, made a $65,000 loan to Harvey Alpert and Michael Cooper which was used for the benefit of the Coopers and Salazar. Alpert testified that he and Michael Cooper obtained the loan together, with a note from Donald and Delmar Cooper guaranteeing repayment. He testified they delivered the loan proceeds to Donald and Delmar Cooper and were told the money was to be used to pay an obligation owed by them at another bank. He testified there were renewal notes made on the loan and that neither he nor Alpert had ever made any payments on the loan. He also testified that at the time of the original loan he knew the loan proceeds were to go to Donald and Delmar Cooper.

A summarization of the transaction was given by an F.B.I. agent on the basis of his analysis of bank records and accounting entries. He testified the $65,000 loan proceeds were disbursed on February 17, 1966, by a Rocky Mountain Bank cashier's check signed by Donald Cooper. After endorsement by Alpert and Michael Cooper, the check was deposited to the trust account of Salazar at another bank on the same day. On February 21, 1966, a check dated February 17, 1966, payable to Denver Revival Tabernacle for $55,000, was charged against Salazar's trust account. This check was endorsed by Delmar Cooper and used together with a $3,775.18 Rocky Mountain Bank cashier's check issued February 17, 1966, payable to Donald Cooper, to purchase a Rocky Mountain Bank cashier's check on February 18, 1966, for $58,775.18 payable to Donald Cooper. The Denver Revival Tabernacle account received $55,938.76 from this cashier's check, and the remainder was returned to Donald Cooper by a $2,836.42 Rocky Mountain Bank cashier's check. Prior to the deposit of $55,938.76, the account ledger for the Tabernacle showed an overdraft of $182.39. On the same day this deposit was made, a $55,754.37 check to American National Bank was charged against the account. This check was a payment in full on a loan of the Tabernacle at that bank.

Repayment of the $65,000 loan to Alpert and Michael Cooper was also included in the F.B.I. agent's summarization. The first payment was a $5,000 Westland Industrial Bank cashier's check drawn on the Rocky Mountain Bank account and was charged to payment of interest on the loan. On March 3, 1967, the loan balance was paid off by a $56,633 check drawn on Paul Cooper's account at Rocky Mountain Bank payable to that bank. There was also a renewal of $5,000 of the principal on the original loan on March 3, 1967. Payments on the renewal loan were made reducing the balance to $3,000 when it was renewed again. The balance of this renewal on January 30, 1969, when the liquidator for the bank took control of the bank, remained

at $3,000. This was susequently paid in full by Donald Cooper's attorney.

The agent's summarization further disclosed the source of funds for the $56,633 payment by Paul Cooper on March 3, 1967, was a loan made by the Rocky Mountain Bank for that same amount on March 2, 1967. This loan was subsequently renewed and the proceeds used to pay the original loan. Ten payments were made leaving the loan balance on December 24, 1968 at $56,028.06 plus $303.45 interest. The balance of this loan was then included and paid in full in the transfer of the Denver Revival Tabernacle property to the Rocky Mountain Bank.

The conspiracy count alleged twelve overt acts, the same acts charged in eleven of the substantive counts. A detailed narrative is unnecessary other than to say the evidence disclosed transactions similar to that detailed previously; that is, borrowers would be secured and loans made with the loan proceeds being delivered to various of the appellants. Transactions were also alleged in which loans were made to allow purchase of a business enterprise by some of the appellants, then loans were made directly to that business.

Violations of 18 U.S.C. § 656 is distinctly limited as to "the class of persons who can violate its provisions, i.e., officers, directors, agents, employees, etc." United States v. Tornabene, 222 F.2d 875, 877 (3d Cir. 1955). The evidence adduced at trial clearly shows that the three Coopers and Salazar were definitely within that class. The offense of "misapplication occurs when an officer of a bank knowingly lends money to a fictitious borrower or causes the loan to be made to his own benefit, concealing his interest from the bank." United States v. Fortunato, 402 F.2d 79, 81 (2d Cir. 1968), *cert. denied*, 394 U.S. 933. There was ample evidence to support the jury's conclusion that the Coopers and Salazar were receiving the benefits of loans without disclosing this fact. There was also ample evi-

dence to support the conclusion that Donald and Delmar Cooper and Salazar acted in concert in committing the offenses. The convictions returned under counts one and five do not fail for lack of proof.

We now turn to the questioned sufficiency of evidence on the verdicts returned under counts eight and nine charging Donald and Delmar Cooper with misapplication and George Norman with aiding and abetting the misapplication in violation of 18 U.S.C. § 2. The two counts charged that two $81,000 loans, one to a Mr. Cloyd Wangsgard and one to Lakewood Medical Center, were made to borrowers secured by Norman and the proceeds used by Norman in his own business enterprises, and also were used by the two Cooper brothers to acquire an interest in one of Norman's businesses. The evidence establishes that the proceeds of the loans were deposited to the Lakewood Medical Center account at the Rocky Mountain Bank on February 23, 1967. Two checks were written on that account on the same day. The first was a check for $37,100 payable to Greater Leasing Company. The second check was for $124,459.21 payable to Rocky Mountain Bank. Evidence, consisting of an application for assignment and transfer of a radio station license, clearly establishes that Donald and Delmar Cooper were directors of Greater Leasing Company on October 5, 1966, each owning 37.5% of the stock. The evidence further reveals the $37,100 deposit was the source of funds for two checks to pay loans charged in counts 6 and 7 which had been previously obtained by Jensen. A check for $28,179.68 to Rocky Mountain Bank was used to pay off the $28,000 balance of a $35,000 loan. The $35,000 loan was a renewal of a prior $25,000 loan made by Jensen at Norman's request as an accommodation for Salazar. A $7,056.73 check was used to pay off a $7,000 loan obtained by Jensen from Westland Industrial Bank. The proceeds of that loan had been paid to Jensen by a Westland Industrial Bank check signed by Donald Cooper. This check was then deposited by Jensen

in his personal account in a Golden, Colorado, bank. At the same time, Jensen made a check payable to Rocky Mountain Bank for $7,000. This check had been used as a payment on the $35,000 loan, reducing that loan to $28,000. The $124,459.21 check, after being shunted through a complicated series of transactions, ultimately went to either Norman or his wife.

The aider and abettor may violate the statute by assisting a bank official in committing the misapplication.[1] Additionally, it must be shown the misapplication was for the benefit of the bank officer or the aider and abettor.[2] The evidence clearly establishes that the loans made to the borrowers secured by Norman were made in part for the benefit of the Coopers. The fact that Norman was not the named borrower in each of the loans does not serve to insulate him. The evidence discloses the active solicitation and securing of borrowers by Norman and renders the ultimate borrowers to be in reality Norman's alter-ego acting at his direction. Viewing the evidence in the light most favorable to the government, we cannot conclude the jury was unjustified in its guilty verdicts under counts 8 and 9.[3]

Appellants raise a multitude of other arguments, many of which are asserted by all. The first argument is that 18 U.S.C. § 656 is unconstitutionally vague and uncertain in its use of the term "willfully misapplies" which has no commonly accepted definition. In this context, they assert the statute punishes acts which are not clearly defined as violative of the statute. In United States v. Archambault, 441 F.2d 281 (10th Cir. 1971), *cert. denied*, — U.S. —, we

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[1] "Essential to the crime of aiding and abetting a bank official in violating Section 656 is the guilt of the bank official." United States v. Tornabene, 222 F.2d 875, 878.

[2] *See* Hall v. United States, 286 F.2d 676 (5th Cir. 1960), *cert. denied*, 366 U.S. 910).

[3] United States v. Miller, F.2d (10th Cir. 1972).

dealt with the adequacy of the term "misapply", stating at 283, " '[T]he statutory concept of misapplication is not a vague word of such uncertain application as to require a dismissal of the indictment.' "[4] We do not find the term so vague as to be constitutionally impermissible.

Appellants next assert errors relative to the indictment and the grand jury proceeding. They first claim prejudicial error in the failure to record the grand jury proceedings. We have recently held the failure to record grand jury proceedings is not error.[5]

It is next asserted the presence of the Assistant United States Attorney vitiates the aura of the grand jury as an independent body standing between the governmental prosecutory function and the citizenry. In this context it is asserted this is violative of Fifth Amendment protections. We cannot agree. F.R.Crim.P. Rule 6(d) specifically provides for the presence of attorneys for the government at grand jury proceedings. Indeed, the government attorney is essential to the fact presentation process by which the grand jury reaches its ultimate decision. Presentation of evidence for the grand jury's consideration is not in contravention of Fifth Amendment due process guarantees.

In a somewhat similar vein, it is asserted the presentation of matters to the grand jury by the United States Attorney or his assistant is in excess of statutorily authorized powers thereby rendering the indictment fatally defective. We have previously stated the government attorney is essential to the grand jury process and do not find error in the presentation of matters to the grand jury by the United States Attorney.[6]

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[4] United States v. Fortunato, 402 F.2d 79, *cert. denied*, 394 U.S. 933.

[5] United States v. Hedges, F.2d , (10th Cir. 1972).

[6] *See* Application of United Electrical, Radio & Mach. Workers of Am., et al, 111 F.Supp. 858 (S.D.N.Y. 1953); United States v. Smyth, 104 F.Supp. 283 (N.D.Cal. 1952).

It is also asserted the grand jury investigation was improperly conducted in that both the indictment and the superseding indictment were drafted and presented to the grand jury prior to its investigation. Citing Gaither v. United States, 413 F.2d 1061, 1069, (D.C.Cir. 1969), appellant Salazar maintains the "indictment is preceded by a grand jury investigation, at the close of which the grand jury votes to indict. The prosecutor then drafts an indictment." Gaither dealt not with the mechanics of the grand jury proceeding, but rather the validity of an indictment drawn by the United States Attorney following the grand jury presentment which was signed by the grand jury foreman without submitting it to the remaining members of the grand jury. That decision dealt with the detrimental effect of an indictment which had been redrafted, altered or amended without prior resubmission and approval by the body of the grand jury. We find no error here in the preparation of the indictment before the grand jury's investigation as that body remains free to accept or reject all or any portion of the indictment it chooses.[7] In the grand jury process, one of the important essentials is the agreement of the requisite members of the grand jury before prosecution can be commenced.

There is next raised an assertion that the superseding indictment under which the convictions were returned is fatally defective and a denial of due process guarantees in that no evidence in addition to that presented in the original indictment proceeding was presented at the superseding indictment proceeding. We held in Edison v. United States, 272 F.2d 684 (10th Cir. 1959), that "[t]he grand

[7] "It is common knowledge, to those who are familiar with the practice, that the District Attorney, or someone in his office, in a large percentage of cases, prepares the indictment, based upon information . . . which is subsequently submitted to, and if accepted by the grand jury as being supported by the facts, becomes the formal indictment." United States v. Brumfield, 85 F.Supp. 696, 704 (W.D.La. 1949).

jury having heard the witnesses once, it was not essential to the validity of the second indictment that they be recalled and give in the form of repetition the evidence previously given before the same grand jury. It was well within the province of the grand jury to return the second indictment without recalling the witnesses and hearing them anew."[8] The record before us indicates it was the same grand jury that returned both indictments; we therefore find no fatal defect in the superseding indictment.

Next, there are direct attacks by two of the appellants against the language employed in the superseding indictment. Appellant Donald Cooper contends the language of the first count charging misapplication of "funds or credits" is a duplicitous charge which fails to clearly inform him of whether he stands charged with misapplication of funds or misapplication of credits. This count of the indictment charges the single offense of conspiracy and is not duplicitous in its inclusion of two modes of misapplication under the statute.[9]

It is also asserted the indictment is defective as being generally vague and ambiguous, failing to charge any offense, and being insufficiently informative of the charges to be faced by them. We have repeatedly held the test of sufficiency of the indictment is that "it contains 'the elements of offense intended to be charged and must be sufficient to apprise the accused of the nature of the offense so that he may adequately prepare a defense.'" United States v. Mason, 440 F.2d 1293 (10th Cir. 1971), *cert. denied*, — U.S. —. The indictment here meets that test.

Donald Cooper next asserts error in the trial court's refusal of his motion for a bill of particulars. Granting or

[8] *See also* United States v. James, 290 F.2d 866 (5th Cir. 1961), *cert. denied*, 368 U.S. 834.

[9] Mulloney v. United States, 79 F.2d 566 (1st Cir. 1935), *cert. denied*, 296 U.S. 658.

denying motions for bills of particulars is at the discretion of the court, and denial of such motion will not be disturbed on appeal unless that discretion was abused thereby denying the accused information more specifically defining the offense charged against him. United States v. Gleeson, 411 F.2d 1091 (10th Cir. 1969). We find no error in the trial court's denial of the motion.

Appellants next raise arguments relative to various areas of improper and prejudicial joinder. The first improper joinder asserted is that of including the conspiracy charge and the separate substantive offenses together in the indictment. It is a general rule that "a conspiracy count may properly be joined with substantive counts where it is alleged and shown that the offenses are of the same or similar character and are based upon two or more acts or transactions connected together or constituting parts of a common scheme or plan." Miller v. United States, 410 F.2d 1290 (8th Cir. 1969), *cert. denied,* 396 U.S. 830. Inclusion in the indictment of the conspiracy count and the separate substantive counts was not improper under F.R.Crim.P. Rule 8(a).[10]

There are next asserted allegations of misjoinder of defendants under F.R.Crim.P. Rule 8(b). In this context it is urged the separate counts of the indictment did not name all the charged defendants, nor was there incorporation of individual counts with the remaining counts. The appellants contend the indictment charges various combinations of individuals with crimes committed in separate transactions without incorporating these separate charges into each other. In United States v. Jorgenson, 451 F.2d 516 (10th Cir. 1971), *cert. denied,* — U.S. —, we held that joinder was proper where all the co-conspirators were familiar with the modus operandi of the fraudulent scheme even though all the co-conspirators were not present

[10] *See* United States v. Scoblick, 225 F.2d 779 (3d Cir. 1955).

at each charged transaction.[11] There was sufficient evidence that the appellants were joint participants in the same act or transaction or series of acts or transactions to warrant their joint indictment. Refusal to sever was not reversible error.

It is also asserted the inherent prejudice to all the co-conspirators required severance under F.R.Crim.P. Rule 14. In Jorgenson we held the onus of showing prejudice under Rule 14 is on the movant and the granting or denial of the motion is within the trial court's discretion. We find no abuse of that discretion, therefore we do not conclude there was improper joinder under Rule 14.

Donald Cooper next maintains that in the absence of severance from Salazar, a continuance should have been granted due to a highly publicized search of the building housing Salazar's offices, the arrest of certain individuals, including Salazar's daughter, for narcotics violations, and a suit filed by Salazar in response to the search and arrests, all of which occurred within the week preceding commencement of this trial. The prejudicial publicity argument presents two interesting variations from the usual situation presented in a contention of this sort. First, the subject of the publicity is not lodging the complaint, but rather a co-defendant; secondly, the publicity is completely unrelated by way of subject matter to the upcoming trial, and is only an event which the news media felt worthy of some exposure. We held in Dennis v. United States, 302 F.2d 5, 8 (10th Cir. 1962), *cert. denied*, 384 U.S. 855, that "the mere fact of unfavorable publicity does not of itself raise a presumption of prejudice .... The prejudice must have manifested itself so as to corrupt due process." On this basis we do not find error in the trial court's denial of the motion for continuance.

Donald Cooper next asserts he was deprived of his right to a fair trial through the prohibition imposed by the trial

[11] *See* United States v. Hickey, 360 F.2d 127 (7th Cir. 1966), *cert. denied*, 385 U.S. 928.

court precluding him from making reference to a prior conviction of the co-defendant Norman. Cooper maintains this prohibition prevented him from testifying effectively as to the reasons for his actions and to further show his intent. We recently dealt with the rule providing for reception of evidence of other crimes in United States v. Burkhart, — F.2d — (10th Cir. 1972). The opinion there dealt extensively with the rule itself, its purpose and the inherent prejudice to one accused against whom such evidence is admitted. Nowhere in that rule do we see a blanket allowance of such evidence if presented by a co-defendant. This type of evidence, once admitted, from whatever source, is equally prejudicial to the accused. The trial judge's admonition here went only to disclosure of Norman's conviction. There was no restriction imposed precluding testimony relating to the transaction. This reflects a judicious limitation imposed by the trial court and we find no error in that limitation.

Appellant Donald Cooper next argues a determination made by the trial court in front of the jury was both prejudicial and an invasion of the jury function. The situation arose when Donald Cooper's attorney objected to a witness' testimony, concerning statements made to the witness by Salazar, as inadmissible hearsay as to Donald Cooper. The trial court overruled the objection stating, "[T]here is evidence tying your client into count 1, the conspiracy. Once the conspiracy has been formed, hearsay is admissible." We held in Dennis v. United States, 346 F.2d 10, 15 (10th Cir. 1965), *rev'd on other grounds,* 384 U.S. 855, that "incriminating statements made by one co-conspirator during the pendency and in furtherance of a conspiracy are admissible as an exception to the hearsay rule once a conspiracy has been shown." The existence of the conspiracy was sufficiently established by independent evidence[12] to warrant the allowance of this evidence, and such determination did not invade the jury function. Appellant also

[12] Glover v. United States, 306 F.2d 594 (10th Cir. 1962).

maintains the court prejudicially affected the weig t of evidence by its characterization that items of evidence would be admitted "against" certain of the defendants. We do not feel the use of the word "against" is improper as emphasizing the evidence confronting the accused.

Error is next asserted relative to the trial court's instructions. Appellants maintain that certain of the instructions were improper and further that the trial court erred in refusing to give certain instructions tendered by the defendants. The instructions given, when considered as a whole adequately explained the applicable law.[13]

Error is next predicated by appellants Donald Cooper and Salazer with respect to evidentiary matters. Salazar contends it was error to allow the jury to consider evidence relative to count two when he was not named in that count in the indictment and a mistrial was granted as to the only named defendant. The evidence relative to count two was relevant both to proof of the substantive offense and the conspiracy. The offense charged in count five was also charged as an overt act of the conspiracy. The evidence was properly received against Salazar in context of the conspiracy.

Evidence relative to three counts was received by the court then subsequently rejected and the counts dismissed or severed. The trial court instructed the jury to disregard this evidence in its deliberations. Donald Cooper asserts this evidence, once presented, denied him a fair and impartial trial. His contention is that it was a physical impossibility for the jury to disregard this evidence in its deliberations. It is presumed the jurors observed the instructions of the court and speculation that this was not done may not be employed in assailing their verdict.[14]

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[13] Jackson v. Kansas City, Ks., 448 F.2d 518 (10th Cir. 1971).

[14] Ellis v. State of Oklahoma, 430 F.2d 1352 (10th Cir. 1970), *cert. denied*, 401 U.S. 1010; United States v. Perea, 413 F.2d 65 (10th Cir. 1969), *cert. denied*, 397 U.S. 945.

Two matters relative to the presentation of evidence to the jury are further raised as reversible error. Appellants first object to the summarization of the extensive bank records, accounting machine tapes, debit and credit slips and loan papers by the F.B.I. agent. They contend this is not a proper case for the use of a summary witness. We have long held that "a qualified expert may examine voluminous or intricate books and records and for the convenience of the court and jury give a summary of their contents . . . ." Hartford Acc. & Indem. Co. v. Collins-Dietz-Morris Co., 80 F.2d 441 (10th Cir. 1935). The use of the summary witness was proper in aiding the understanding of the evidence presented.

Error is also asserted relative to the delivery to the jury by the trial court of a list of exhibits linking exhibits to specific counts of the indictment. We view this as being in the nature of summary of the evidence by the trial court which is permitted.[15] We find no error, particularly in view of the record showing complete disclosure by the trial court of its intention to prepare the exhibit list. Following discussion, counsel for appellants approved of this, after being assured they would be permitted to see the list prior to its delivery to the jury.

Other points have been raised by appellants, including a contention the cumulative effect of the trial errors requires reversal. We have considered these other points raised and find them without merit.

Affirmed.

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[15] *See* Davis v. United States, 227 F.2d 568 (10th Cir. 1955).

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

[Caption Omitted]

July Term — July 12, 1972

Before Honorable Jean S. Breitenstein, Honorable Delmas C. Hill and Honorable Robert H. McWilliams, Circuit Judges.

This cause came on to be heard on the record on appeal from the United States District Court for the District of Colorado, and was argued by counsel. On consideration whereof, it is ordered that the judgment of said court is affirmed. It is further ordered by this court that George I. Norman, Jr., appellant, surrender himself to the custody of the United States Marshal for the District of Colorado, in execution of the judgment and sentence imposed upon him within ten days from and after the date of the filing of the mandate of this court in said district court.

HOWARD K. PHILLIPS, *Clerk*

By /s/ HELEN R. BARTHA
Deputy Clerk

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

[Caption Omitted]

July Term — August 25, 1972

Before Honorable David T. Lewis, Chief Judge, Honorable Jean S. Breitenstein, Honorable Delmas C. Hill, Honorable Oliver Seth, Honorable William J. Holloway, Jr., Honorable Robert H. McWilliams, Honorable James E. Barrett and Honorable William E. Doyle, Circuit Judges

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This matter comes on for consideration of motions for leave to file supplements to the petitions for rehearing filed by Donald S. Cooper and by Francis R. Salazar in the captioned cases. Upon consideration whereof,

It Is Ordered that the motions for leave to file the supplements are granted.

The Court also has for consideration petitions for rehearing, as supplemented, filed by all of the defendants-appellants in the captioned cases, together with suggestions for rehearing en banc filed by Francis R. Salazar and George I. Norman, Jr., in their individual captioned cases.

Upon consideration whereof, the petitions for rehearing are denied by Order of Circuit Judges Jean S. Breitenstein, Delmas C. Hill and Robert H. McWilliams, the panel who heard oral argument and to whom the cases were submitted.

The petitions for rehearing having been denied by the panel to whom the case was argued and submitted, and no member of the panel nor judge in regular active service on the Court having requested that the Court be polled on

rehearing en banc, (Rule 35, Federal Rules of Appellate Procedure), the Petitions for Rehearing En Banc are DENIED.

There are also pending motions for stay of mandate pending rehearing and, in event of denial, pending petitions for writs of certiorari to the United States Supreme Court. Upon consideration whereof,

IT IS ORDERED that the mandates in the captioned cases are stayed pursuant to Rule 41(b), Federal Rules of Appellate Procedure, until September 25, 1972 and if during the period of the stay there is filed with the Clerk of this Court a notice from the Clerk of the Supreme Court that the parties who have obtained the stay have filed a timely petition for the writ in that Court, the stay as to such parties shall continue until final disposition by the Supreme Court.

It is the further ORDER of the Court that the defendants-appellants in the captioned cases may remain free on their existing bonds until the appellate process reaches final disposition, or until further Order of this Court.

/s/ HOWARD K. PHILLIPS
Howard K. Phillips
Clerk

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Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-485

GEORGE I. NORMAN, JR., *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

SUPPLEMENT TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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Pursuant to Rule 24(5) of the Rules of the Court, the petitioner respectfully submits this supplement to his petition for a writ of certiorari.

SUPPLEMENTAL QUESTION PRESENTED

3. Does the decision below conflict with that of the United States Court of Appeals for the Second Circuit (per Friendly, C.J.) in *United States* v. *Docherty*, —— F.2d ——, decided October 31, 1972?

SUPPLEMENTAL STATEMENT

Subsequent to the filing of the petitioner Norman's petition for a writ of certiorari, the United States Court of Appeals for the Second Circuit, in an opinion by Chief Judge Friendly, has rendered a decision reversing a criminal conviction under the "willful misapplication" statute—a decision that squarely conflicts with the reasoning of the court below. *United States* v. *Docherty*, — F2d —, slip op. 293 (2d Cir. Oct. 31, 1972).[1]

SUPPLEMENTAL REASON FOR GRANTING THE WRIT

III. THE SECOND CIRCUIT'S DECISION IN UNITED STATES v. DOCHERTY CREATES A CONFLICT BETWEEN THE CIRCUITS IN THE ADMINISTRATION OF § 656.

As is set forth in the petition, Norman was convicted on two counts of aiding and abetting the willful misapplication of bank funds, in violation of 18 U.S.C. § 656. The essence of the Government's case against Norman was that he had used nominees to draw down two loans from the subject bank, and then applied the loan proceeds to bank officers who used the funds to their own benefit. There was no dispute that the parties in whose name the loans were taken were fully competent to repay the loans: as for one loan, to a Norman-controlled company, the Government conceded that the income from the corporate property more than sufficed to meet payments; as for the other, the Government's proof revealed that the person who took down the loan had a net worth treble the amount of his borrowing.

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[1] The decision is reprinted as Appendix E herein.

The Second Circuit, in an opinion by Chief Judge Friendly, has now expressed concern with the on-going application of § 656, and has held that on facts even more favorable to the Government than those in Norman's case, the prosecution has failed to make out an offense under the statute. *United States* v. *Docherty*, —— F.2d —— (Appendix E herein).

The facts of *Docherty* are these. Docherty borrowed money from a Buffalo bank at the behest of Evans, an old friend and one of the bank's officers. Docherty then turned over the proceeds to Evans at Evans' request. When Docherty asked why Evans did not simply borrow the money himself, he was informed that bank policy prohibited Evans' borrowing from his own bank. Thus, Docherty was put on actual notice that Evans was acting in violation of bank rules.

Docherty, like Norman, was charged with aiding and abetting in several substantive violations of § 656, and with conspiracy to violate that statute. The jury acquitted as to some counts, and deadlocked as to others; it convicted Docherty on the conspiracy count and the substantive counts that were the subject of appeal.[2] On appeal, the Second Circuit reversed with instructions to dismiss the indictment.

Chief Judge Friendly notes that the statutory language of "willful misapplication" has "proved troublesome from the outset" (Supp. Pet. 6a). He also warns against the dangers of "an undue extension" of the statute "as a result of the ill-conceived work of the 1948 reviser," who deleted the requirement of an intent "to injure or defraud" the bank or to "deceive"

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[2] The conspiracy count also involved a charged violation of 18 U.S.C. § 1005. The court of appeals reversed on other grounds.

a bank officer or agent appointed to examine the affairs of the bank (Supp. Pet. 9a). After reviewing early Supreme Court decisions under the statute, and noting that a charge of aiding and abetting must be supported by evidence that the defendant "had knowledge that the officer intended to effect a conversion" (Supp. Pet. 7a), Judge Friendly reviews a series of appellate decisions—decisions the thread of which he finds to be "a considerably greater degree of iniquity or foreseeable loss than anything of which Docherty knew" (Supp. Pet. 8a).

The operative test, as set forth by Judge Friendly, is this:

> "When a defendant is charged simply as an aider or abettor, submission to the jury is warranted only if there is enough evidence to show that he knew of such activity of the principal [here, the statutory offense set forth in § 656] and desired to forward it" (Supp. Pet. 5a).

"Our summary alone," says Judge Friendly, "demonstrates the insufficiency of the evidence" (*id*). Specifically, he writes:

> "Here there was clearly no sufficient evidence of intent to 'injure' the bank. Docherty knew he was putting his own credit on the line, and it is not suggested that he lacked the means to repay [citation omitted]. As to defrauding, even if we assume arguendo that failure to disclose the true recipient of the proceeds was a misrepresentation, the case lacks the element of foreseeability of damages essential even for a civil suit [citations omitted]. Indeed, there will be no damages at all from the transactions in which Docherty took part, if, so far as the record shows, the notes are collectible. . . . Finally, there was no intent to deceive

> a bank officer or examiner. Docherty's failure to disclose the true recipient of the proceeds of the loan cannot be considered a deceit when . . . he made no false statement of his purpose for the loan" (Supp. Pet. 9a-10a).

Each of the elements enumerated by Judge Friendly is abundantly present in Norman's case. First, the parties in whose names the loans in question were taken down knew they were putting their own credit on the line. Norman's accountant so testified. And the company whose office-building asset fully secured the second loan caused all its shares to be pledged at the bank as security for the loan. There is no suggestion that either Norman or his nominees lacked the means to repay the loans.

Second, even assuming—as the Second Circuit was willing to do in Docherty's case—that Norman is chargeable with a failure to disclose the true recipient of the proceeds of the loans, there is no evidence whatever to make out the element—required by the Second Circuit—of foreseeability of damages essential for a civil suit. To the contrary, the evidence with respect to one of the Norman loans was that the office-building income more than sufficed to meet payments, and no evidence with respect to the ultimate collection of the other loan was admitted against Norman.

Finally, the record here is devoid of evidence that Norman intended to deceive any bank officer or examiner, whether by disguising the fact that his accountant and the company he controlled acted as his nominees, or—on the Government's own theory—by withholding secrets from the very officials with whom he was dealing.

Dissenting, Judge Lumbard urges that the Second Circuit's *Docherty* decision cannot be reconciled with its earlier ruling in *United States* v. *Fortunato,* 402 F.2d 79 (2d Cir. 1968) (Supp. Pet. 13a)—the very ruling on which the courts below relied in upholding Norman's conviction!

The factual circumstances of the *Docherty* and *Norman* cases are so close as to be virtually indistinguishable. The proper administration of criminal justice in the federal system requires that differing outcomes not result from two so closely parallel cases. And the reviewing function of this Court is required to resolve the radically different interpretations of § 656 that have emerged in the *Norman* and *Docherty* cases.

SUPPLEMENTAL CONCLUSION

The petitioner Norman respectfully submits that the Court should grant his petition to deal both with the issues presented in his initial filing, and with the con-

flict between the Second and Tenth Circuits that has emerged subsequent to that filing.[3]

Respectfully submitted,

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[3] We are advised that the Government has decided not to seek this Court's review in *Docherty*. No petition for rehearing was filed in the court of appeals.

APPENDIX

APPENDIX E

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA, *Appellee*,

v.

ROBERT H. DOCHERTY, *Appellant*.

Before:

FRIENDLY, *Chief Judge*,
LUMBARD and FEINBERG, *Circuit Judges*.

FRIENDLY, *Chief Judge*:

In this prosecution of a 35-year old lawyer, the Government has sought to press to the verge the section of the federal criminal code, 18 U.S.C. § 656, prohibiting the theft, embezzlement or misapplication of bank funds by a bank officer or employee. Admittedly, the defendant, a borrower from a Buffalo, N.Y. bank, neither obtained nor sought any personal gain. Moreover, so far as concerns the transactions in which he participated, or of which he knew, he is bound and, so far as the record shows, is able, to make the bank whole. Our problem is whether the Government has gone only to the verge or beyond it.

There is no real dispute over the facts: The defendant, Robert Docherty, met Edward Evans in 1956 while both were students at the University of Buffalo. They became, and remained, close personal friends. After graduation, Evans went into the service of Manufacturers & Traders Trust Company of Buffalo (M & T), where, by 1968, he had risen to the post of assistant vice president in charge of the personal loan section of the bank's Installment Loan Department. Docherty entered and completed law school,

and was admitted to practice. In 1962 Docherty had begun borrowing from M & T for tuition and other purposes. The loans, concededly legitimate, were arranged through Evans. Later Docherty and his law partner secured a joint loan of $7,000 from M & T. Each of these loans was repaid prior to Docherty's indictment. The procedure, followed also with respect to the loans that formed the subject of the indictment, was for him to sign an application and a note, with the amount of the latter and the summary sheet[1] temporarily left blank pending the bank's computation of prepaid interest and other charges. Evans would write "See Ed Evans" or its equivalent on the summary sheet, which was an indication to the collection department that Evans should be notified if any default occurred. All this was standard procedure.

Docherty's troubles began with a luncheon discussion in October 1965, when Evans told Docherty that he needed money to buy some stock and requested that Docherty borrow $2,000 and reloan it to him. When Docherty asked why Evans didn't borrow the money himself, Evans answered that bank policy prohibited his borrowing from his own bank. Docherty countered with a query why Evans didn't borrow from another bank; Evans replied that the bank frowned upon this also. Docherty filled out the note and application. He did not fill out the blank in the application with respect to the purpose of the loan, a course that was not uncommon. Evans told him there was no need to complete the credit statement or furnish other information since M & T had Docherty's financial statements in connection with his personal loans. The bank made the loan; Docherty picked up the $2,000 check, cashed it, and gave Evans the proceeds. He also turned over to Evans the

---

[1] This shows the gross amount of the loan, the deductions for prepaid interest, life insurance, etc., and the net amount of the loan. It also gives payment information, *i.e.*, the number and amount of installment payments.

"coupon book" which reminded the borrower of the dates and amounts of installment loan payments.

The process was repeated in February 1966. When Docherty asked what had happened about the first loan, Evans said it had been paid. Except for some increases in amount, substantially the same facts recurred in June 1966, in May, August and September 1967, and in February and April 1968. Evans' stories to Docherty were that he wanted to buy stock, to pay off earlier loans or, on one occasion, to invest in a gas station. With respect to the substantive counts based on these transactions, the jury either acquitted (as to the 1965 and 1966 loans) or disagreed.

In July 1968 Evans asked Docherty to take out a loan of $4800. When Docherty protested that the amount was too high, Evans answered that he had decided not to buy stock but would instead use the proceeds to repay a prior loan. Docherty deposited the bank's $4800 check in his own account, drew a check in the same amount to M & T, and gave it to Evans. Evans turned it over to M & T in payment of the earlier loan, and Ourser, a vice president of the bank, advised Docherty that the loan had been repaid. On September 4, 1968, Docherty made another $3,000 loan; the proceeds went to Evans. On October 29 he signed a blank note at Evans' request; Evans filled it in for $6,292.44. Of the $5,000 in net proceeds, $2,000 were used to pay off the September loan, and a $3,000 bank check was deposited by Evans, without Docherty's endorsement, to the account of Larry's Petro Service, which he was also manipulating, without Docherty's knowledge. The final transaction occurred late in 1968 or early 1969, when Docherty, assuming that all earlier loans had been paid by Evans, signed another blank application and note. The bank issued a check for $4800 payable to "R. Docherty." Evans forged Docherty's endorsement and cashed the check at a Las Vegas hotel. When signing this last note, Docherty had demanded that Evans render an accounting before he

would endorse any more checks; doubtless this led to the forgery. The jury convicted on the four substantive counts relating to these notes.

Late in 1968 Docherty had received his first "late payment" notice from the bank. Thinking this related to one of the loans he had made for his own account, he instructed his secretary to make the payment. When she informed him that the notice did not relate to any of his personal loans, he telephoned Evans, who said that the bank had made an error and instructed that the notice should be sent on to him. Ultimately, it was discovered that Evans had been manipulating the accounts of six or seven other friends and making payment of the old loans with the proceeds of new ones; his total embezzlements were in the neighborhood of $300,000.

It will be convenient to deal first with the conspiracy count, on which the jury also convicted. This charged a conspiracy to violate not only 18 U.S.C. § 656 but also § 1005. The relevant provision of § 1005 condemns:

> Whoever makes any false entry in any book, report or statement of such bank with intent to injure or defraud such bank . . . or to deceive any officer of such bank, or the Comptroller of the Currency, or the Federal Deposit Insurance Corporation, or any agent or examiner appointed to examine the affairs of such bank, or the Board of Governors of the Federal Reserve System . . .

We fail to see what "false entry" Docherty participated in making. The loans were recorded as his liabilities, and they are. Contrast *Hargreaves* v. *United States*, 75 F.2d 68, 72 (9 Cir. 1935), where a bank officer had caused sham notes to be recorded. Neither was there sufficient evidence that Docherty made any false statements of his purpose for the loans. In only one instance did he make any statement of purpose. This was with regard to the June 1966

loan, where he filled in the word "personal" in the space on the loan application appearing after the phrase "Proceeds of Loan to be used for." In light of the principles applicable in the construction of criminal statutes, see *Bell* v. *United States*, 349 U.S. 81 (1955), we would not consider this description of a loan made as an accommodation to a friend to be a "false entry"; a statement that he intended to use the loan to buy a car or for office expenses would stand quite differently. The conviction on the conspiracy count thus cannot survive unless there was sufficient evidence to show the violation of § 656 charged in it and in the four substantive counts on which Docherty was convicted as an aider and abettor.[2]

A violation of 18 U.S.C. § 656, requires so far as here relevant, a situation where a bank officer, director, agent or employee "embezzles, abstracts, purloins or willfully misapplies any of the moneys, funds or credits of such bank . . ." When a defendant is charged simply as an aider or abetter, submission to the jury is warranted only if there is enough evidence to show that he knew of such activity of the principal and desired to forward it. 18 U.S.C. §2; *United States* v. *Peoni*, 100 F.2d 401, 402 (2 Cir. 1938); *United States* v. *Turnipseed*, 272 F.2d 106, 107 (7 Cir. 1959). Our summary alone demonstrates the insufficiency of the evidence under our recent decision in *United States* v. *Taylor*, F.2d (2 Cir. 1972) slip opinions 3943 or, for that matter under the previous rule in this circuit, to show knowledge on Docherty's part that Evans intended to embezzle, abstract or purloin moneys, funds or credits of M & T. The validity of his conviction must therefore rest on holding that his admitted knowl-

[2] Perhaps it could not survive in any event because of the possibility that the jury could have convicted on the basis of a conspiracy to violate § 1005 alone, although this is minimized by the convictions on the four substantive counts under § 656. In view of our conclusion with respect to § 656, it is unnecessary to consider this.

edge that the proceeds of the loans were going into Evans' hands in violation of the bank's internal rules [3] constituted guilty knowledge of willful misapplication.

The words "willfully misapply" first appeared in the Act of June 3, 1864, ch. 106, § 55, 13 Stat. 116, which, in addition, required proof of intent "to injure or defraud the [banking] association or any other company or body politic or corporation, or any individual person, or to deceive any [bank] officer . . . or any agent appointed to examine the affairs of [the bank] . . . ." The Act of April 6, 1869, ch. 11, 16 Stat. 7, added an aiding or abetting offense.

The phrase "willfully misapply" has proved troublesome from the outset. In *United States* v. *Britton*, 107 U.S. 655, 669 (1883), the Supreme Court, answering certified questions with respect to a multi-count indictment under the statute, noted that:

> The words "willfully misapplied" are, so far as we know, new in statutes creating offenses, and they are not used in describing any offense at common law. They have no settled meaning like the word "embezzle," as used in the statutes, or the words "steal, take and carry away," as used at common law.

Particularly relevant is the Court's discussion of a count charging the bank president with having used funds of the

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[3] On brief in this court, although apparently not at the trial, the Government also relies on N.Y. Banking Law § 103-8, which prohibits any bank or trust company from lending money to any executive officer or director unless the making of the loan was approved in writing, not more than three months earlier, by a majority of the board of directors (excluding any director receiving the loan) or was within a general resolution of similar tenor, subject to various exceptions, one being loans not exceeding at any one time $5,000 or 1% of the bank's net worth, whichever is less. Apart from other considerations, there was not sufficient evidence of Docherty's knowledge that the loans to Evans exceeded the permitted figure.

bank to purchase its own stock, which he held in trust for the bank's use. Conceding that such a purchase by the bank itself, except to secure a debt, would be forbidden by law, the Court held that this count did not set forth an offense, stating, 107 U.S. at 666-67 (emphasis added):

> We think the willful misapplication made an offense by this statute means, a misapplication for the use, benefit or gain of the party charged, or of some company or person other than the [banking] association. Therefore, to constitute the offense of willful misapplication, there must be a *conversion* to his own use or the use of some one else, of the moneys and funds of the association by the party charged.

See, to the same effect, *United States* v. *Northway*, 120 U.S. 327, 332 (1887). It would follow that, to support a conviction for aiding and abetting in a "willful misapplication," the alleged aider or abettor must have knowledge that the officer intended to effect a conversion. The Court also stated in *Britton*, 107 U.S. at 667, that the counts relating to the stock purchase "[charged] maladministration of the affairs of the bank, rather than criminal misapplication of the funds" and that, if the counts were held to be good, "every official act of an officer, clerk or agent of a banking association, by which its funds are applied in a way not authorized by law, would be punishable . . . ." It would seem to follow a *fortiori* that mere knowledge that the transactions here at issue violated a bank rule would not suffice to support a conviction for aiding and abetting.

There are two other early Supreme Court cases, which, on different facts, upheld indictments for wilful misapplication. *Evans* v. *United States*, 153 U.S. 584, 591-93 (1894), sustained an indictment which charged a bank director with aiding and abetting wilful misapplication by causing the cashier to discount an unsecured note. Con-

ceding that discount of such a note was not in itself a misapplication, the Court concluded that the indictment was saved since it could be read as charging that, to the knowledge of the director and cashier, the maker of the note had no intention to pay. *Coffin* v. *United States,* 156 U.S. 432, 449-51 (1895), similarly held there was a wilful misapplication when a bank officer had discounted an unsecured note of a maker he knew to be insolvent.

The cases where courts of appeals have upheld convictions for wilful misapplication have involved a considerably greater degree of iniquity or of foreseeable loss than anything of which Docherty knew. Wilful misapplication has been found, for example, when a bank employee knowingly engaged in a check "kiting" scheme for the benefit of depositors, *United States* v. *Mullins,* 355 F.2d 883 (7 Cir.), *cert. denied,* 384 U.S. 942 (1966); when a bank employee paid money out to a customer on a check he knew was backed by insufficient funds and then concealed the overdraft, *Logsdon* v. *United States,* 253 F.2d 12 (6 Cir. 1958); when a bank officer loaned money without security, knowing that the borrower could not repay, *Robinson* v. *United States,* 30 F.2d 25 (6 Cir. 1929); when a depositor repeatedly overdrew his account, knowing that the branch manager was consistently ignoring this, *Benchwick* v. *United States,* 297 F.2d 330 (9 Cir. 1961); when a bank officer caused his bank to borrow from another and pocketed the proceeds, leaving his own bank only with a personal note of an employee of the lending bank which he had no reason to think would be paid, *Hargreaves* v. *United States,* 75 F.2d 68 (9 Cir.), *cert. denied,* 295 U.S. 759 (1935); and, as we have recently held, when a bank officer pocketed the proceeds of loans knowingly issued on the strength of fraudulent loan applications, *United States* v. *Fortunato,* 402 F.2d 79 (2 Cir. 1968), *cert. denied,* 394 U.S. 933 (1969). On the other hand, *Johnson* v. *United States,* 95 F.2d 813 (4 Cir. 1938) (Soper, J.), held that no crime was charged when the indictment alleged only

that a bank president, whose conduct was characterized with a copious array of pejorative adverbs, had discounted a note payable to himself and applied the proceeds to his own account, in order to meet an overdraft. The court found the indictment flawed since there was no allegation that the maker was known to be insolvent or to have an intention not to pay.

In applying the provision of 18 U.S.C. § 656 relating to "wilful misapplication," courts must be mindful of its history and avoid undue extension as a result of the ill-conceived work of the 1948 reviser. Until that time the statute, as previously noted, after defining the prohibited acts, had included a requirement of intent "to injure or defraud" the bank or "to deceive" a bank officer or agent appointed to examine the affairs of the bank. See 12 U.S.C. §§ 592, 597 (1945). When these sections were repealed and 18 U.S.C. § 656 was substituted, by the Act of June 25, 1948, ch. 645, § 656, 62 Stat. 729, the Reviser represented that: "The revised section without changing in any way the meaning or substance of existing law, clarifies, condenses, and combines related provisions largely rewritten in matters of style." Some courts, referring to the Reviser's Note, have properly held that intent to injure or defraud remains an element of the offense. *E.g., Seals* v. *United States,* 221 F.2d 243 (8 Cir. 1955); *Logsdon* v. *United States,* 253 F.2d 12 (6 Cir. 1958), *aff'g* 132 F. Supp. 3 (W.D. Ky. 1955); *Ramirez* v. *United States,* 318 F.2d 155 (9 Cir. 1963). Others, including our own, while not discussing the omission of the intent language from § 656, have continued to treat intent to injure or defraud as an essential element of the crime. *E.g., United States* v. *Mullins, supra,* 355 F.2d 833; *United States* v. *Fortunato, supra,* 402 F.2d 79. By the same token an intent to deceive remains an alternative mental element. See 18 U.S.C. § 1005.

Here there was clearly no sufficient evidence of intent to "injure" the bank. Docherty knew he was putting his

own credit on the line, and it is not suggested that he lacked the means to repay. *Cf. United States* v. *Matot,* 146 F.2d 197 (2 Cir. 1944). As to defrauding, even if we assume *arguendo* that failure to disclose the true recipient of the proceeds was a misrepresentation, the case lacks the element of foreseeability of damages essential even for a civil suit. Prosser, Torts § 110, at 732 (1971). *Cf. United States* v. *Harper,* 33 F. 471, 481-82 (S.D. Ohio 1887); *Seals* v. *United States, supra,* 221 F.2d at 249. Indeed, there will be no damages at all from the transactions in which Docherty took part, if, so far as the record shows, the notes are collectible. Beyond this we are by no means convinced that, when Congress speaks of intent to defraud in a criminal statute, it means merely the attitude of mind that would support a civil action. Compare the discussion of the meaning of "wilful" in *United States* v. *Murdock,* 290 U.S. 389, 394-95 (1933); *Spies* v. *United States,* 317 U.S. 492, 497-98 (1943); and *Screws* v. *United States,* 325 U.S. 91, 101 (1945). Finally, there was no intent to deceive a bank officer or examiner. Docherty's failure to disclose the true recipient of the proceeds of the loan cannot be considered a deceit when, as we have held, he made no false statement of his purpose for the loan.

We thus should have had little doubt that Docherty's conviction must be reversed for insufficiency of evidence were it not for the portion of this court's recent decision in *United States* v. *Iannelli,* 461 F.2d 483 (2 Cir. 1972), *petition for cert. filed,* 41 U.S.L.W. 3137 (U.S. Sept. 19, 1972), relating to the defendant Squires. If the statement in that opinion, *id.* at 486, that "[i]t was sufficient to show only that Squires knew that Michael's actions in transferring the money to Iannelli somehow constituted a breach of the bank's rules" were to be read alone and out of context, it would require affirmance here. But that is not the way to read an opinion—or anything else. A statement in an opinion must be read in the light of the facts and contentions to which it is addressed. Squires claimed in this

court that he could not be convicted unless he knew that Michaels was violating a specific directive from the bank's regional vice president. The quoted language was addressed to this specific contention. Moreover, there was evidence that Iannelli, who was forbidden by the bank from receiving additional credit, had outstanding unpaid loans and that his personal checking account was overdrawn. In sharp contrast to Docherty's case, there was also evidence that Squires' own status as a borrower was dubious. No credit check was run upon him; he used a false name in signing the note; and he misrepresented the purpose of the loan. Beyond this Squires was the actor in arranging meetings between Michaels, the bank officer who was being subverted, and Iannelli, the beneficiary. The distance between the two cases is enough so that, while Squires' case was properly found to fall within the statute, Docherty's does not.

The judgment of conviction is reversed, with instructions to dismiss the indictment.

LUMBARD, *Circuit Judge* (dissenting):

I do not think that the government has gone "beyond the verge" in this prosecution. Nor do I think it relevant to our decision, as does the majority, that Docherty received no personal benefit from the loans and may be able fully to repay them. A conviction as a conspirator or as an aider and abettor only requires that the defendant knew of the illegal activity and sought to forward it; he need have no other personal stake in the outcome. *See United States* v. *McKnight*, 253 F.2d 817, 819 (2d Cir. 1958). That the defendant is a 35-year old lawyer and himself derived no money from the scheme is relevant on matters of sentence and executive clemency; these facts in no way absolve him from guilt.

Docherty was convicted on one count of an indictment charging him with conspiring with Edward Evans to vio-

late 18 U.S.C. §§ 656 and 1005 and on four substantive counts charging him with aiding and abetting Evans in violating § 656. Section 1005 prohibits making "any false entry in any [bank] book, report or statement." The majority reasons that since Docherty made no representation about the ultimate purpose of the loans, no false statement was made to the bank. This is a far too wooden reading of the statute. There is simply no doubt that the entries made here (based as they were on the incomplete loan application) conveyed an entirely false impression of the transaction. In fact, the loans were to Docherty in name only. Evans was to be the primary obligor and Docherty was acting solely as his agent. If the bank had been fully informed about the ultimate destination of the proceeds, it would have refused to make the loans as violative of both internal bank policy and state law. See New York Banking Law § 103-8. Without Docherty's misrepresentations the scheme would have failed.

The majority attempts to distinguish this case from *Hargreaves* v. *United States*, 75 F.2d 68 (9th Cir. 1935). *Hargreaves* also involved a bank officer arranging a loan of bank funds to a third party who had no genuine economic interest in the transaction and who was to transfer the loan proceeds to the bank officer. The defendant argued that no false entries were made because the notes "were correct as shown by the books of the bank." *Hargreaves* v. *United States*, *supra* at 72. Nonetheless, the court concluded that the officer was guilty of making false entries because he misrepresented the "true nature of the transaction." *Hargreaves* v. *United States*, *supra* at 72. Although the majority refers to the notes in *Hargreaves* as shams, they are no more nor less so than the notes given by Docherty. Both makers obtained the loans under their own names and were fully liable for the amounts due, regardless of intention or ability to pay.

To be convicted under section 656 Docherty must have known that Evans was effecting a conversion of bank

funds. Despite intimations to the contrary in the majority opinion, it seems clear that Docherty's knowledge that Evans was misusing bank funds for his own ends would be sufficient knowledge of conversion to satisfy the statute. See *Morissette* v. *United States*, 342 U.S. 246, 271-72 (1952).

A conviction for willful misapplication also requires an intent "to injure or defraud" the bank or "to deceive" a bank officer or agent appointed to examine the affairs of the bank. See 12 U.S.C. §§ 592, 597 (1945). Here Docherty had an intent to deceive. He deliberately misled bank officials into thinking that the loan was for his use when, in fact, the proceeds were going to Evans in violation of state law and bank policy. In addition, the intent to injure is also made out on these facts, since it clearly appears that Docherty willingly engaged in a scheme to enable Evans to use bank funds knowing full well that such loans were prohibited.

The majority uses a test which combines the foreseeability of loss with the degree of defendant's iniquity to determine whether there was sufficient evidence of criminal intent. By the majority's reasoning no violation of § 656 would occur when a bank officer decided to borrow bank money under an assumed name to finance stock speculations and other ventures, if he had every intention at the time to repay the bank from a relatively secure source of future funds (like a declared but not yet payable dividend from a large corporation)—even if he later was unable to pay. Such a result would be unacceptable. As we held in *United States* v. *Fortunato*, 402 F.2d 79, 81 (2d Cir. 1968), "misapplication occurs when an officer of a bank knowingly lends money to a fictitious borrower or causes a loan to be made to his own benefit." Docherty deliberately, and with full knowledge of the illegality of what Evans was doing, made it possible for Evans to secure the funds. He has been found guilty upon sufficient evidence under a charge to the jury which correctly and fairly spelled out the elements of the crime charged.

The conviction should be affirmed.

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In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-483

FRANCIS R. SALAZAR, PETITIONER

v.

UNITED STATES OF AMERICA

No. 72-485

GEORGE I. NORMAN, JR., PETITIONER

v.

UNITED STATES OF AMERICA

No. 72-525

DONALD S. COOPER, PETITIONER

v.

UNITED STATES OF AMERICA

No. 72-5454

DELMAR E. COOPER, PETITIONER

v.

UNITED STATES OF AMERICA

No. 72-5563

PAUL E. COOPER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals is reported at 464 F. 2d 648.

JURISDICTION

The judgment of the court of appeals was entered on July 12, 1972. A petition for rehearing was denied on August 25, 1972. The petitions in Nos. 72-483, 72-485, and 72-5454 were filed on September 22, 1972. In Nos. 72-525 and 72-5563, Mr. Justice White extended the time for filing the petitions, and they were timely filed on September 29, 1972 and October 13, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether 18 U.S.C. 656 was properly applied to petitioners' conduct as evidenced at trial (raised in all petitions).

2. Whether petitioners were properly joined under Rule 8, F.R.Crim.P. (Nos. 72-483 and 72-485), and whether the denial of motions for severance under Rule 14, F.R.Crim.P., exceeded the trial court's discretion (Nos. 72-483, 72-485, and 72-525).

3. Whether petitioner Donald Cooper's testimony was improperly limited (No. 72-525).

4. Whether the trial court erred in declining to give a proffered instruction defining the term "bank" (No. 72-483).

5. Whether petitioners' conspiracy convictions were improper (Nos. 72-483, 72-525, and 72-5454).

6. Whether the superseding indictment was properly prepared and whether the grand jury proceedings should have been recorded (Nos. 72-483 and 72-525).

STATEMENT

Petitioners Donald Cooper, Delmar Cooper, Paul Cooper and Francis Salazar were charged in a thirteen-count indictment with having misapplied funds of a federally insured bank in violation of 18 U.S.C. 656, and having conspired to violate that statute.[1] Petitioner Norman was charged as an aider and abettor (18 U.S.C. 2). Five of the substantive counts were disposed of by dismissal or severance. Following a jury trial in the United States District Court for the District of Colorado, petitioners Delmar Cooper, Donald Cooper and Salazar were convicted on the conspiracy count.[2] The three Coopers and Salazar were convicted on count five (the Alpert-Cooper loan). Petitioners Donald Cooper, Delmar Cooper, and Norman were convicted on counts eight and nine (the Wangsgard and Lakewood loans). Petitioners Donald Cooper, Delmar Cooper, Salazar and Norman received concurrent sentences of three years' imprisonment on each of the counts for which they were convicted. In addition, petitioners Delmar Cooper and Donald Cooper were fined $1,500 on each of four counts; petitioners Salazar and Norman, $2,000 on each of two counts. Petitioner Paul Cooper's sentence of two years' imprisonment was suspended and he was placed on probation for two years. In addition

[1] One Allen Hurt was named as a co-conspirator but not indicted.

[2] Motions for judgment of acquittal on this count were granted as to Paul Cooper and Norman (T. 1641).

he was fined $2,000. The court of appeals affirmed (464 F. 2d 648).

In summary form, the evidence showed that petitioners Donald Cooper, Delmar Cooper, Paul Cooper and Salazar were officers and directors of the now defunct Rocky Mountain Bank of Lakewood, Colorado.[3] They were found to have misapplied the monies of Rocky Mountain Bank by making or causing to be made loans for their benefit through strawmen or through corporations which they owned or were in the process of acquiring, without disclosing to the bank their interest in the loans. Petitioner Norman aided and abetted in certain of these transactions.

The evidence with respect to count five of the indictment showed that in February 1966, petitioner Salazar induced Harvey Alpert and Michael Cooper (no relation to petitioners) to obtain a $65,000 loan from the Rocky Mountain Bank as a personal favor to Salazar.[4] The loan papers indicated the money was for "new bus-

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[3] Together with co-conspirator Hurt, petitioners dominated the Board of Directors of the bank. The bank's Loan and Discount Committee was throughout the pertinent period composed almost exclusively of bank director petitioners.

The Rocky Mountain Bank was closed on January 30, 1969, by state banking authorities (T. 1053).

[4] The loan was approved by the Loan and Discount Committee. On the committee at the time were Donald Cooper, Paul Cooper and Salazar. Delmar Cooper was an alternate member and secretary. The loan was also approved by the board of directors with all petitioner directors present.

The $65,000 was initially given to Donald and Delmar Cooper, who gave Alpert and Michael Cooper a note guaranteeing repayment. Neither Alpert nor Michael Cooper received any proceeds from the loan nor did they make any payments on the loan.

iness in the construction field." Salazar deposited the funds in his trustee account at another bank and gave $55,000 of this money to the Denver Revival Tabernacle, a Cooper brothers enterprise,[5] to pay off an overdue Tabernacle loan made by another bank. Of the remaining $10,000, Salazar deposited $3,000 in his personal account, took $5,000 in cash, and used $650 to replace a previously drawn check. The Alpert-Cooper loan was later repaid by a $5,000 Westland Industrial Bank bank money order drawn on the bank's account,[6] a $5,000 renewal by Alpert and Michael Cooper, and a loan to Paul E. Cooper for the $55,000 balance plus accrued interest.[7] The $5,000 renewal was eventually paid by petitioner Salazar[8] (T. 140, 148-151, 220-246, 355-400, 582-583, 666-698, 806-807, 1423-1505; GX 2A-2C, 4A-4C, 12, 100-118A, 500-501, 503, 515-522, 525-526, 529, 532, 536-537, 539-541, 543A, 544-554, 558, 566, 566A, 567, 571, 578A-578I).[9]

The evidence adduced on counts eight and nine showed that on February 24, 1967, petitioners approved an $81,000 unsecured loan to one Cloyd Wangsgard,

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[5] Donald, Delmar and Paul Cooper were directors of the Tabernacle.

[6] Until May 1969, the Westland Industrial Bank was controlled by petitioner bank directors.

[7] As discussed *infra*, p. 9, the balance due on this note was settled by a transfer to the Rocky Mountain Bank of the Denver Revival Tabernacle at a highly inflated price.

[8] The renewal was also made as a personal favor to Salazar for the Coopers. Alpert and Michael Cooper made no payments on the renewal.

[9] "T." refers to the trial transcript, and "GX" refers to the government exhibits.

and another $81,000 loan to Lakewood Medical Center, Inc.[10] These loans were made to enable Donald and Delmar Cooper to purchase an interest in the Lakewood Medical Center building owned by a Norman family corporation, Medical Enterprises, Inc. A secondary purpose was to repay funds which Donald and Delmar Cooper had earlier secured from the bank through the use of one J. Robert Jensen as a strawman.[11]

Petitioner Norman informed Cloyd Wangsgard, his accountant, that he had borrowed to capacity at the Rocky Mountain Bank, and persuaded Wangsgard to secure the loan for Norman's use. Wangsgard was given a hold harmless agreement signed by Norman and Delmar and Donald Cooper. Petitioner Norman also induced his brother-in-law, Richard Head, to assist in forming Lakewood Medical Center, Inc. Norman installed Head as president, and directed him to secure a loan for Lakewood Medical Center from the Rocky Mountain Bank in the amount of $81,000.

Both the Wangsgard and the Lakewood Medical Center loans were disbursed for the benefit of petitioners Norman and Donald and Delmar Cooper. From the proceeds of the two loans, $37,100 was deposited to the account of Greater Leasing Company, a corporation of which Delmar and Donald Cooper were the principal stockholders, and was used as the source of funds to repay the Jensen loan. The remainder, after having

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[10] At this time $81,000 was the greatest amount which the bank could loan to any one borrower.

[11] See note 15, *infra*.

been disbursed in a manner designed to conceal the source of the funds, was used to purchase the Medical Center from Medical Enterprises, Inc., of which Norman's wife was the principal stockholder.[12] Title to the property was transferred to Lakewood Medical Center, Inc., Donald and Delmar Cooper, and Norman's wife.

At the time of trial, the Rocky Mountain Bank had suffered a loss of approximately $60,000, including interest, on the Wangsgard loan.[13] Of payments made on

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[12] The funds were transferred by checks, signed by Head, drawn on the Lakewood Medical Center Account. The $37,100 check was deposited directly to Greater Leasing's account. A $124,459.21 check was used to purchase a cashier's check, payable to Wangsgard, who at Norman's direction exchanged the check for five money orders payable to Real Estate, Inc. Three of the money orders were deposited to the account of Norman's wife. One money order was exchanged for two cashier's checks payable to Norman's wife. The fifth money order was exchanged for five cashier's checks payable to Norman. The various funds were then used for the purchase of the Medical Center.

[13] On April 1, 1968, the $78,000 balance on this loan was paid by two checks, each in the amount of $39,000. One was signed by Victor Lederman and the other, by Marvin Lederman. Each check specified that it was for the purchase of a one-half interest in the Wangsgard note. On the same day, two unsecured commercial loans of $39,000 were made to Victor and Marvin Lederman by Delmar Cooper with Committee approval. The Ledermans asked for and received a written guarantee of repayment and purchase with full recourse. A few days later the Ledermans were contacted by the State Banking Commissioner. They thereafter returned the Wangsgard note, which necessitated the return of the Lederman checks and the repayment of the Lederman loans. This repayment was accomplished by a $20,395.40 cash payment (source not revealed) and the proceeds of a $59,000 unsecured loan to Randall Wright, made by Delmar Cooper with Committee approval. Only

the loan, five were made by checks drawn on the Lakewood Medical Center account and signed by Norman; two were made by checks drawn on the Greater Leasing Company account; and one was made by a charge to the account of Mediterranean Spa, Ltd., whose corporate officers were Donald and Delmar Cooper and Norman (T. 250, 252-253, 258-261, 265-269, 303-304, 318, 401-405, 410-418, 427-429, 432, 435-437, 441-442, 463, 472-487, 957-958, 1093; GX 5C, 8A, 8C, 9G, 700, 726, 800, 801A, 803A, 804-808, 811-815, 817-818, 819B, 821B, 822B, 823B, 824B, 825B, 826B, 828, 829B, 830B-830I, 831A-831C, 832, 833).

In addition to the transactions previously described, further evidence of the conspiracy disclosed a series of loans made by the bank in October 1965,[14] and in July and September 1966, and April 1967.[15]

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three payments were made on the Wright loan, leaving a balance owing as of December 31, 1968 of $58,397.67.

At the time of trial, payments on the $81,000 loan to Lakewood Medical Center were current.

[14] These loans were to enable Salazar, Donald and Delmar Cooper and Hurt to purchase a beer and liquor distributorship in Safford, Arizona, and were made to petitioner Paul Cooper and others (T. 97-100, 109-122, 152-156, 159-170, 180, 182, 210-213, 224-225, 1452-1457, 1459-1460, 1747, 1803, 1969-1970, 2054, 2060-2061, 2063, 2065-2066; GX H, I, 1B, 6, 10, 10A-10G, 10K, 10L, 10N, 100, 100-118A, 122, 200-226, 233-296, 300-316, 320, 324, 326, 328, 332, 336, 340, 344, 348, 352, 354-355, 357, 359-360, 370, 372, 400-407, 412, 416, 420, 422, 426).

[15] These loans were made to J. Robert Jensen, who, at petitioner Norman's request, obtained them for the benefit of petitioners Salazar and Donald Cooper. These loans were variously deposited for the account of, and repaid by loans obtained by, Greater Leasing Company and Westland Industrial Bank, corporations controlled by petitioner bank directors and involved in the Alpert-Cooper, Wangsgard and Lakeland loans (T. 232-234, 700-702,

In December 1968, knowing that the bank might be sold and that it was in danger of being closed, the bank director petitioners transferred to the Rocky Mountain Bank the real property of the Denver Revival Tabernacle, a Cooper brothers enterprise, in satisfaction of a $275,000 balance owing on loans made by the bank to Paul Cooper,[16] Donald Cooper's wife, the Denver Revival Tabernacle, Westland Industrial Bank, and Motels, Inc., another Cooper enterprise. The fair market value of the property was approximately $105,000 (T. 519-523, 526-527, 537, 967, 971, 978-981, 1079-1083, 1179, 1524; GX 3, 100-115, 116, 118, 118A, 121).

ARGUMENT

1. Petitioners contend that it was improper to apply 18 U.S.C. 656 to their conduct, arguing that there could be no misapplication of funds because allegedly *bona fide* borrowers capable of repaying the loans were involved in the transactions. But the stand-in borrowers obtained by petitioners were *bona fide* only in the sense that they were real persons. The evidence clearly disclosed a course of conduct whereby petitioner bank directors exploited their positions as bank directors in order to obtain bank funds for their benefit without disclosing to the bank their interests in these loans, which were made to individual strawmen procured by them and by petitioner Norman, and to corporations in which their interests remained undisclosed.

750-753, 1338-1346, 1477-1483, 1775, 1781, 1786; GX FRS-L, FRS-W, 7, 7A, 600 series, 700 series, 804, 806-808, 808A, 808B, 1101, 1103, 1105).

[16] This loan had been used to repay the balance on the Alpert-Cooper note.

The aim of the statute, to prevent abuse of the authority enjoyed by bank directors regarding the use and disbursement of bank funds, properly applies to the situation disclosed by the evidence summarized above. Thus, the court properly instructed the jury that a willful misapplication under Section 656 occurs when a bank officer causes a loan to be made for his own benefit and conceals his interest in the loan from the bank. *United States* v. *Fortunato,* 402 F. 2d 79, 80-81 (C.A. 2), certiorari denied, 394 U.S. 933.[17] Moreover, the court also properly instructed, contrary to petitioner Donald Cooper's assertion (Pet. No. 72-525, p. 10), that such misapplication must be done with an intent to injure or defraud the bank (T. 2689-2690). See *United States* v. *Mullins,* 355 F. 2d 883, 886 (C.A. 7), certiorari denied, 384 U.S. 942; *Giragosian* v. *United States,* 349 F. 2d 166, 168 (C.A. 1).[18]

Petitioner Norman likewise contends that application of Section 656 to his conduct constitutes an unwarranted extension of the statute to a financially sound and acceptable activity, *i.e.,* the use of nominees to secure loans. This objection, however, misconceives both

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[17] We do not read the Second Circuit's recent decision in *United States* v. *Docherty,* No. 72-1299, decided October 31, 1972, as having altered this standard. See note 19, *infra.*

[18] Contrary to petitioner Paul Cooper's contention (Pet. No. 72-5563, p. 1), it is unnecessary in a prosecution under Section 656 to prove that the bank actually suffered any loss. *United States* v. *Fortunato, supra,* 402 F. 2d at 81; *Golden* v. *United States,* 318 F. 2d 357, 360-361 (C.A. 1); *Benchwick* v. *United States,* 297 F. 2d 330, 334 (C.A. 9). However, as noted above, the bank did suffer a loss on the Wangsgard loan and on all those, including the Alpert-Cooper loan, satisfied by the transfer of the Tabernacle property at a grossly inflated valuation.

the reach of the statute and its application to the particular circumstances of this case. Petitioner was not convicted for the mere use of nominees to obtain bank monies.

The Wangsgard loan, on which the bank had suffered a loss of approximately $60,000 at the time of trial, was obtained through the active procurement of petitioner Norman for the benefit of petitioner bank directors Donald and Delmar Cooper. Norman, along with the Coopers, executed a hold harmless agreement which was not brought to the attention of the bank. Similarly, the loan to Lakewood Medical Center was procured at the behest of Norman and the proceeds of the loan were used to benefit Donald and Delmar Cooper. In both instances, the interests of the Coopers in these loans were concealed with Norman's assistance. Thus, the culpable conduct was not the mere use of nominees, but rather Norman's aiding and abetting of the misrepresentations which enabled petitioner bank directors to exploit their positions to obtain benefits which were concealed from the bank.[19]

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[19] In *United States* v. *Docherty, supra,* note 17, Docherty was convicted of aiding and abetting a violation of 18 U.S.C. 656. He had obtained numerous loans for the benefit of a friend, an officer of the bank who had sought Docherty's assistance in obtaining the loans, advising him that, due to the bank's policy, he could not personally apply for the loans. The court concluded that Docherty neither sought nor obtained any personal gain, nor did he misrepresent the purpose of any loan. Moreover, there was insufficient evidence to establish Docherty's knowledge of the principal's "willful misapplication" or a desire to facilitate that activity, as required in the prosecution of an aider and abettor. The court also concluded that an intent to injure or defraud the bank was an

Petitioners' contention that the term "misapplication" is so indefinite as to render 18 U.S.C. 656 unconstitutionally vague has been rejected. See *United States* v. *Archambault*, 441 F. 2d 281, 283 (C.A. 10); *United States* v. *Fortunato, supra*, 402 F. 2d at 81. The term is sufficiently precise, conveying as it does the notion of misuse of bank funds, to apprise those like petitioners that exploitation of positions as bank officers for the purpose of obtaining bank monies by misrepresentation is prohibited conduct.

2. Petitioners contend, for a variety of reasons, that their motions for severance were improperly denied.

a. Petitioner Norman contends (Pet. No. 72-485, pp. 16-27) that joinder under Rule 8, F.R.Crim.P., was improper because he was indicted on only five of the eight counts, one of which (the conspiracy count) was dismissed as to him. He also points to the fact that two of his co-defendants were not named in any of the counts on which he was indicted. Moreover, he contends that the joinder permitted much evidence unrelated to him

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essential element of the offense, and that there was insufficient evidence of such an intent.

Here, on the other hand, petitioner Norman, as an aider and abettor, actively facilitated the misrepresentation which enabled him and the Coopers to obtain the bank funds. Norman's intricate disbursement of the loan proceeds certainly supported the inference that he knew of the Coopers' efforts to deceive the bank, and intended to facilitate that effort by concealing the source of funds. Furthermore, the bank ultimately suffered a substantial loss on this loan, as a result of the manipulations of petitioners. This evidence was sufficient on the question of Norman's intent to injure or defraud to permit submission of the various counts to the jury.

to be considered by the jury and that the sheer volume of such evidence, once the conspiracy count was dismissed, prejudiced his cause. He also argues that, with the dismissal of the conspiracy charge, evidence previously admitted against him became inadmissible and that no instruction could have cured the improper submission of such evidence. Thus he argues that following the dismissal of the conspiracy count, a severance should have been granted under Rule 14, F.R.Crim.P. Finally, he contends that a severance should have been granted due to the announced intention of co-defendant Donald Cooper to testify that he had taken certain actions with respect to the loan transactions because of the financial problems generated by petitioner Norman's conviction in a Colorado state court.

It is clear that the initial joinder of the defendants under Rule 8(b), F.R.Crim.P., was permissible since the indictment alleged joint participation in the same transaction or series of transactions. *Schaffer* v. *United States,* 362 U.S. 511, 514. Joinder was not improper because petitioner Norman was not charged in each count. Rule 8(b) expressly provides that "all of the defendants need not be charged in each count." It does not require all defendants to be charged jointly in even one of the offenses charged in the indictment. Cf. *United States* v. *Hoffa,* 349 F. 2d 20 (C.A. 6), affirmed, 385 U.S. 293.

Since the initial joinder was proper, any subsequent severance was controlled by Rule 14, F.R.Crim.P., which provides for separate trials where the defendant demonstrates prejudice from the joinder. That the

conspiracy count was dismissed as to petitioner Norman did not require severance here in the absence of such a showing. *Schaffer* v. *United States, supra,* 362 U.S. at 514-516. Although petitioner Norman maintains that, in light of the dismissal of the conspiracy count, much otherwise inadmissible evidence might have been considered against him by the jury, it is clear that the proof was "carefully compartmentalized" as to petitioner. *Schaffer* v. *United States, supra,* 362 U.S. at 515. The evidence adduced at trial and specifically related to petitioner's activities was properly admissible on the four substantive counts before the jury involving him. Moreover, the court expressly instructed the jury not to consider any evidence against petitioner Norman other than that adduced on the counts under which he was charged (T. 2602-2603). The jury's acquittal of petitioner Norman on counts six and seven indicates its ability, in accordance with the court's instructions, to segregate the evidence adduced against petitioner. Under these circumstances, as in *Schaffer,* there was no misjoinder.[20]

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[20] The court was advised during the third week of trial that the defendant Donald Cooper would testify that he became involved in the loans to Robert Jensen, the transactions charged in counts six and seven of the indictment, because petitioner Norman had been convicted in state court and could not, therefore, apply for a license renewal for a radio station to which the bank had loans outstanding. Greater Leasing, in which Jensen had an interest, was attempting to acquire the radio station and the theory of Cooper's defense to count seven was that he had participated in the loan to assure that the renewal was obtained and thereby protect the bank's interest. The court would not permit Cooper to refer to Norman's prior conviction and suggested instead (T. 1724) that Cooper

b. The contention of petitioner Salazar, who was charged in the conspiracy count and six substantive counts,[21] that joinder was improper under Rule 8(b) because the indictment failed to allege the joint participation of the various defendants is wholly without merit. In addition to the discussion above, we point out that the various overt acts alleged under the conspiracy count also formed the basis for the charges on the substantive counts. Each substantive count under which Salazar was charged also alleged participation by certain of the co-defendants. It is thus clear that the indictment alleged joint participation in the same transactions or series of transactions and that joinder under Rule 8(b) was therefore permissible.

c. Petitioner Donald Cooper's contention that a severance was required because of allegedly prejudicial publicity involving co-defendant Salazar is answered in the opinion of the court of appeals upon which we rely. See Pet. No. 72-525, App. A, pp. 15-16.

3. Petitioner Donald Cooper also contends that the

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testify that he became involved because Norman could not participate in the license renewal. Cooper testified that due to "extenuating circumstances," an "emergency situation involving Norman" (T. 1972-1976), it became necessary for him to approve the loans to protect the bank's best interests (T. 1719-1725, 1733-1737, 1772, 1775, 1779-1780, 1808-1815, 1859-1862, 1881-1884, 1888-1898, 1916-1925, 1972-1976). We think it clear that these references conveyed no intimation of wrongdoing on Norman's part and therefore were not prejudicial. Thus, this testimony did not require that the court grant a severance under Rule 14. In any event, these allegedly prejudicial remarks were adduced with respect to counts six and seven, on which Norman was acquitted.

[21] A motion for judgment of acquittal was granted on two of these counts (T. 1642-1643).

limitation imposed on his testimony with respect to the prior conviction of petitioner Norman (*supra*, note 20) constituted reversible error. As the trial court noted, however, Donald Cooper's presentation of his defense to count seven, on which he was acquitted, was not jeopardized because he could not specifically refer to the fact of Norman's conviction. He was permitted to point out to the jury that he had become involved in the transaction for the purpose of obtaining a renewal of the radio station's license because Norman could not participate in the license renewal (T. 1719-1725, 1733-1737, 1772, 1775, 1779-1780, 1808-1815, 1859-1862, 1881-1884, 1888-1898, 1916-1925, 1972-1976). It was not the reason therefor—*i.e.*, Norman's conviction—that was significant to the theory of defense.[22]

4. Petitioner Salazar contends that the court improperly declined to give his proffered instruction that the alleged concealment of the interests of the defendant bank officers and directors must have been "from a majority of the Board of Directors of the Rocky Mountain Bank" (Pet. No. 72-483, pp. 29-30).[23] As the court of appeals concluded (Pet. No. 72-483, App. A, p. 18), however, the trial court's thorough instructions adequately explained the applicable law. The error of petitioner's contention is obvious since he in effect contends that the jury should have been instructed that

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[22] In fact, the trial court concluded, on the basis of its own research, that Norman was not precluded as a prior convicted felon from obtaining a license (T. 1736-1737, 1808-1815, 1888-1898).

[23] The record does not indicate that this language was included in proffered instruction No. 19. Discussion of the instruction centered upon other language (T. 2422-2423).

if there were no concealment from the co-conspirators, there could have been no misapplication.

5. Petitioners Salazar and Delmar and Donald Cooper contend, relying upon *Kotteakos* v. *United States,* 328 U.S. 750, that their conspiracy convictions were improper because the proof at trial did not establish the existence of a single, general conspiracy, but rather several distinct conspiracies. But the evidence clearly established a relationship among the various transactions charged as both overt acts and substantive counts. For example, the Alpert-Cooper loan was used to repay an obligation of the Denver Revival Tabernacle, which was eventually transferred to the bank at an inflated price in satisfaction of the loan made to Paul Cooper and loans made to various Cooper brothers enterprises. Also, the balance on the Alpert-Cooper note was paid by the loan to Paul Cooper, which was "satisfied" by this transfer. Similarly, proceeds from the Wangsgard and Lakewood Medical Center loan were in part used to repay the Jensen loans.

6. The contentions of petitioners Donald Cooper and Salazar with respect to the propriety of the preparation of the superseding indictment and the failure to record the grand jury proceedings pose no issue warranting review and are fully answered in the opinion of the court of appeals, upon which we rely. See Pet. No. 72-525, App. A, pp. 10-13.

CONCLUSION

It is therefore respectfully submitted that the petitions for writs of certiorari should be denied.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-485

GEORGE I. NORMAN, JR., *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

REPLY BRIEF OF PETITIONER

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REPLY BRIEF OF PETITIONER

The government thinks it sufficient to support the judgment below to argue that Norman aided and abetted his co-defendant bank directors to "exploit their positions to obtain benefits which were concealed from the bank" (Br. in Opp. 11) (footnote omitted). That is enough, the government submits, to sustain a conviction under 18 U.S.C. § 656. A violation of that statute occurs, the government says, "when a bank officer causes a loan to be made for his own benefit and conceals his interest in the loan from the bank" (*id.* 10). For this proposition the government relies upon the Second

Circuit's decision in *United States* v. *Fortunato*, 402 F.2d 79 (2d Cir. 1968), *cert. denied*, 394 U.S. 933 (1969) —as did the courts below at the prosecution's urging. Yet the Second Circuit, in its recent decision rendered after *Fortunato* and the judgment below, has squarely ruled (through Chief Judge Friendly) that enabling bank officers to exploit their positions to obtain benefits concealed from the bank—the charge against Norman as now defined by the government—does *not* aid and abet a violation of the statute. *United States* v. *Docherty*, —— F.2d —— No. 72-1299, decided October 31, 1972.*

The government says it "do[es] not read the Second Circuit's recent decision . . . *Docherty* . . . as having altered this standard [for § 656]" (Br. in Opp. 10, n. 17). But Judge Lumbard, dissenting in *Docherty*, reads that decision as accomplishing precisely such an alteration, by abandoning the *Fortunato* precedent (Supp. Pet. 13a).

The government's efforts to distinguish *Docherty* on the facts are similarly meritless. First, it says, Norman "actively facilitated the misrepresentation which enabled him and the Coopers to obtain the bank funds" (Br. in Opp. 12, n. 19). This can refer only to the fact that Norman drew down the loans through nominees rather than by himself—an action which the government now concedes is "financially sound and acceptable" (Br. in Opp. 10), and which, by itself, has never been the basis of a criminal charge under § 656. The fact is that, putting to one side Norman's use of nominees, the government's evidence shows that he did noth-

* The *Docherty* decision was the subject of a supplement to Norman's petition, filed November 30, 1972.

ing other than what Docherty did—he surely engaged in no misrepresentation as to the purpose of any loan, nor did he aid and abet in any such misrepresentation. Docherty, to the contrary, knew full well that the loans he was drawing down from the bank were not for his "personal" use, although he so stated; and he knew something that no one has ever suggested Norman could have known or did know—that the bank officer arranging the loans was disabled by bank rules from taking them.

Second, the government retreats to its charge that Norman's "intricate disbursement of the loan proceeds certainly supported the inference that he knew of the Coopers' efforts to deceive the bank, and intended to facilitate that effort by concealing the source of the funds" (*id.*). The charge of "intricate disbursement" merely confirms Norman's contention that the jury was permitted to find guilt on the basis of complexity in his business dealings. Moreover, there is nothing in that disbursement, "intricate" or otherwise, that casts any light on the state of Norman's knowledge as to the Coopers' alleged efforts to deceive the bank, or Norman's supposed intent to facilitate those efforts. Surely, no inference may be drawn from the disbursement that comes close to the *direct* evidence in *Docherty* that the defendant knew the bank officer with whom he was dealing, and on whose behalf he was drawing down bank loans, was disabled by bank rules from receiving those funds.

Finally, the government relies on the fact "that the bank ultimately suffered a substantial loss on this loan [referring to one of the two transactions], as a result of the manipulations of petitioners. This evidence was

sufficient on the question of Norman's intent to injure or defraud to permit submission of the various counts to the jury" (*id.*). But the evidence of "manipulations" on which the government now relies to show Norman's intent was ruled inadmissible as to Norman by the trial judge.*

The government now advises counsel for Norman that it will not seek this Court's review of the *Docherty* decision. The government thus acquiesces in an important, narrowing interpretation of a major criminal statute by one of the country's most eminent and respected jurists. But, confronted with a case on all fours with the one it has just accepted, the government refuses to extend relief to the petitioner whose position cannot be meaningfully distinguished from that of an identically situated defendant. In each case, a man has gone to trial charged with assisting a bank officer to borrow money from his bank without the bank's knowledge. In one case, the court has found an offense under the statute; in the other, not. The uniform administration of federal criminal justice demands that the question whether such activity is an offense under the law not

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* The reason for the trial court's ruling was sound—the loss occurred one and a half years after Norman's contact with the transaction. The trial court properly and repeatedly ruled that because of the remoteness of intervening occurrences and the absence of any connective link to Norman, such evidence could not be used against him. The court expressly excluded the testimony of a government witness as against Norman on this score (Tr. 519)—a ruling corroborated days later (Tr. 1214). And it excluded as against Norman the documentary exhibits upon which the government based this allegation (Tr. 655, 1214). As the court put it, "[O]nce the funds are taken from the bank and you can show the disposition of those funds, why then the case is closed as far as those particular individuals involved are concerned" (Tr. 649).

turn on the fortuity of the judicial circuit in which a defendant goes to trial. Given the government's acquiescence in *Docherty*, and its failure to confess error herein, the petitioner Norman can look only to this Court for relief in correcting this manifest incongruity, and only this Court can resolve the conflict between the Circuits.

For the foregoing reasons, the petitioner, George I. Norman, Jr., respectfully submits that the Second Circuit's decision in *Docherty* compels reversal of the judgment below, as do the failure of proof of an offense under the statute and the prejudice resulting from denial of a severance. The petitioner submits that the Court should grant the petition to resolve the conflict between the Second and Tenth Circuits.

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Washington, D.C.

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MICHAEL RODAK, J

IN THE

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v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR REHEARING

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v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR REHEARING

Pursuant to Rule 58(2) of the Rules of this Court, the petitioner, George I. Norman, Jr., hereby petitions this Court for rehearing of its order dated January 8, 1973, denying Norman's petition for a writ of certiorari.

In a supplement to his petition for the writ, Norman urged the Court to consider the divergence of views between the Courts of Appeals for the Second and Tenth Circuits in the interpretation of 18 U.S.C. § 656, which prohibits the "willful misapplication" of bank monies. Norman pointed to the Second Circuit's recent decision in *United States* v. *Docherty*, 468 F.2d 989 (2d Cir. 1972). There, the court of appeals, in a significant opinion by Chief Judge Friendly, substantially altered its reading of § 656, as previously applied in *United States* v. *Fortunato*, 402 F.2d 79 (2d Cir. 1968),

cert. denied, 394 U.S. 933 (1969), and reversed a conviction with instructions to dismiss the indictment.

But *Fortunato,* from which the Second Circuit has retreated in *Docherty,* underlay the rulings in the courts below that Norman was guilty of aiding and abetting a violation of § 656. The decision on which the Tenth Circuit relied to sustain Norman's judgment of conviction has thus been all but abandoned in the Second Circuit, where it was initially promulgated.

A recent decision by the Court of Appeals for the Tenth Circuit, which did not come to the attention of Norman's counsel until after this Court denied certiorari in his case, demonstrates that Norman's position is not unique, but that the problem he faces appears to be a recurring one. In *United States* v. *Acree,* 466 F.2d 1114 (10th Cir. 1972), the Tenth Circuit has again invoked the *Fortunato* precedent in sustaining a conviction under § 656. There, the defendant-appellant urged that his conviction be set aside because the government failed to show that the subject bank sustained a loss.* Acree's defense rested on the contention that he acted for the ultimate good of the bank, and that the bank could have benefited in the long term by his conduct. The court of appeals rejected this contention:

> "The ultimate or future possibility or probability of benefit to the bank is *not a defense* to a misapplication of funds at the time of [the transactions complained of in the indictment] .... The offense occurred and was complete when the misapplication took place. What might have later happened as to repayment *is not material and could not*

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* This Court denied Acree's petition for a writ of certiorari on January 22, 1973. — U.S. —, 41 U.S.L.W. 3410. The petition did not present any question concerning the conflict posed by the Second Circuit's *Docherty* decision.

be a defense." 466 F.2d, at 1118 (emphasis supplied).

Thus, the Tenth Circuit takes the position that a "misapplication" takes place—in its words—"when it takes place." This circular reasoning, which excludes any consideration of the reasonable unlikelihood of loss by the subject bank, flies in the face of the Second Circuit's analysis in *Docherty*. Judge Friendly there wrote:

> "As to defrauding, even if we assume *arguendo* that failure to disclose the true recipient of the proceeds was a misrepresentation, *the case lacks the element of foreseeability of damages essential even for a civil suit* ... Indeed, there will be no damages at all from the transactions in which Docherty took part, if, so far as the record shows, the notes are collectible. *Beyond this we are by no means convinced that, when Congress speaks of intent to defraud in a criminal statute, it means merely the attitude of mind that would support a civil action.*" 468 F.2d, at 995 (emphasis supplied).

Thus, while the Second Circuit reads § 656 to require at least a showing by the government that the defendant has foreseen damage to the bank as a result of the transactions in which he has allegedly engaged, the Tenth Circuit has denied that evidence tending to disprove such damage is relevant.*

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* The Tenth Circuit's refusal to recognize the probative force of such evidence is especially significant in Norman's case. For information received by Norman's attorneys from the Federal Deposit Insurance Corporation ("FDIC") subsequent to this Court's denial of certiorari demonstrates that the government will surely show a profit on its acquisition of the assets of the Rocky Mountain Bank and subsequent collections on the bank's assets—even taking into account the FDIC's administrative expenses incurred in the process. The FDIC has also confirmed that the medical center

Such a divergence of views goes to the heart of § 656. That divergence will require ultimate resolution by this Court. Norman respectfully submits that he, along with others who suffer the anomaly of irreconcilable interpretations of a major federal criminal statute by the various courts of appeals, is entitled to this Court's judgment.

Respectfully submitted,

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building, the stock of whose controlling company was pledged to the bank as security for one of the Norman loans, is the largest of the several hundred unliquidated assets still held by the FDIC; that the property has been independently appraised on three occasions at amounts equal to or exceeding $500,000; that from the date of the FDIC's acquisition to December 31, 1972, the property has produced a net profit in excess of $80,000; and that the FDIC intends to sell the property this year for the benefit of the bank.

CERTIFICATE OF COUNSEL

The undersigned, a member of the Bar of this Court, hereby certifies that the foregoing petition for rehearing is presented in good faith and not for delay, and is restricted to the grounds specified in Rule 58(2) of the Rules of this Court.

GERALD D. STERN